No. 11,638

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES McLAUCHLAN, ROBERT M. PHELPS, BURT D. LACKYARD, and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
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BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, convicting appellants of violations of Section 1 of the Sherman Act (Act of Congress, July 2, 1890, as amended, 26 Stat. 209, 15 U.S.C. Sec. 1), said section being set forth in full at Appendix A, pages 1-2.

Jurisdiction in the District Court was claimed under Section 24 of the Judicial Code, as amended (28 U.S.C. 41).

Jurisdiction of this Court is conferred by Judicial Code, Sec. 128 (28 U.S.C. 225).

STATEMENT OF THE CASE.

SUMMARY.

It is believed that a brief summary will assist the Court in familiarizing itself with the details which will be given hereinafter.

The appellants are Local 36 of the International Fishermen & Allied Workers of America (for convenience called IFAWA) and a number of its officers.

The subject of the indictment was the collective action of the union in seeking an agreement with dealers of fresh market fish for the purpose of regulating the method by which the price of fish to the dealer was to be set.

The issues presented by the indictment reach, for the first time in adjudicated cases, into the economics of a neglected phase of our national food production. Although the government's conception of the issues was such as to treat fishermen as jobbers and middlemen, the problems presented cannot be disposed of by verbal similarities or superficial classification. The common law, as well as modern economics, long recog-

nized that original producers of food are of a different order from others in the economic life of a society, and must be distinguished from commercial dealers who receive the commodity for distribution after its production. Congress by express statutory exemptions from the Sherman Act has recognized that farmers and fishermen are charged with the most vital of all productions.

The land and the sea are the source of all of man's food. The farmer and the fisherman stand at the threshold of nature to draw sustenance from weather and geography for mankind. Of the two crafts, the fisherman is no doubt the more ancient, because until man became accustomed to a relatively permanent home, crops could not be planned or harvested. But the sea, from time immemorial, has yielded its substance to man though he were equipped only with the most primitive tools and though he expended a minimum of effort.

Some of the rudimentary nature of the craft of the fisherman remains today. Although big business has commenced to transform fishing for canneries and some other branches, in the kind of fishing which is the subject of this appeal, the sound of the gasoline engine is almost the only thing which distinguishes this fishing from what must have been done on the shores of the Mediterranean at the beginning of recorded history. If appellants have misconceived their rights under existing law, the economics of the fishing industry at the producers' stage will indeed be at the level of ancient Phoenicia.

As is true in almost every case based on the Sherman Act, the evidence is to be understood in the context of the industry as a whole. This is particularly true in the case at bar; the economics of original producers, although the subject of numerous technical studies, has not yet found its way into adjudications. For these reasons we believe the Court will require a careful analysis of the economic facts of the fishing industry in the area which is the scene of the indictment.

THE FACTS.

On August 23, 1946, the Grand Jury returned an indictment against the defendants based upon alleged activities of the defandants taking place between May 1, 1946 and the date of the indictment. The indictment alleged that the Local was an organization of fishermen who own, lease, or operate a boat for the purpose of engaging on their own account in the business of catching fresh fish for the purpose of sale to dealers. Individual defendants are alleged to be such fishermen and members and officers of the Local. It was alleged that the fishermen were not employees and did not receive a salary. It is then charged that the appellants engaged in a conspiracy (1) "to fix, determine, establish, and maintain arbitrary, artificial and non-competitive prices for the sale to dealers of fresh fish", and (2) "to prevent dealers who do not agree to pay said prices from obtaining, selling or shipping any fresh fish"; and to impose a contract

containing such prices upon fish dealers by picketing and boycotting. It was further charged that as a result of the conspiracy the amount of fish coming in to the ports involved was considerably reduced and the public has been prevented from receiving a normal and usual supply of fish. (Tr. 2-20.)

On September 23, 1946, the defendants filed a motion to dismiss. (Tr. 21-25.) The motion was based upon the grounds that the indictment did not state facts sufficient to constitute an offense, and that the activities of the defendants were exempt from the provisions of the Anti-Trust Law by reason of the statute authorizing fishermen marketing agencies (48 Stat. 1213, 15 U.S.C.A. 521, 522) and by virtue of the provisions of the Clayton Act (38 Stat. 731, 15 U.S.C.A. 17). The motion was denied.

When the cause came on for trial on February 18, 1947, the defendants moved to dismiss the indictment and to challenge and strike out the entire jury panel on the ground that it had been selected in an improper manner. The District Court took evidence on these motions and on March 12, 1947 denied them. (Tr. 25-30.) Thereupon the case proceeded to trial.

At the conclusion of the government's case, the defendants moved to strike certain exhibits and testimony and also to dismiss the indictment or, in the alternative, to order a nonsuit. These motions were denied. (Tr. 30-33.) Whereupon the defense put on its case.

Before the case was submitted to the jury the defendants moved for a judgment of acquittal; this motion was likewise denied. (Tr. 1775-1777.)

On May 7, 1947 the jury returned verdicts of guilty as charged against each of the defendants, now appellants here.

On May 12, 1947, defendants moved for a judgment of acquittal or for a new trial on the following grounds: The District Court had erred in denying the defendants' prior motions to dismiss and for acquittal; the verdict was contrary to the weight of the evidence; the verdict was not supported by substantial evidence; the Court had erred in sustaining objections, in admitting testimony over objections and in its charge to the jury. This motion was heard on May 21, 1947 and denied.

Immediately thereafter the Court ordered the defendants to pay the fines indicated below and to stand committed until paid: Kennison, Knowlton, Lackyard, McComas, Munson, Phelps, Sawyer and Smith, \$10.00 each; Kibre, \$2000.00; McKittrick, \$1500.00; McLauchlan, \$2000.00; Morkowski, \$1500.00; Zafran, \$2000.00. The defendant Local 36 was ordered to pay a fine of \$3000.00.

Notice of appeal on behalf of each of the appellants was filed on May 22, 1947. (Tr. 98-100.)

Bail has been arranged for the individual appellants.

A. The business of the appellants.

Local 36 is affiliated with the International Fishermen and Allied Workers of America which in turn is affiliated with the Congress of Industrial Organizations. Its offices are at San Pedro, California. About 75% of all the fishermen who fish in the area from Morro Bay off Southern California to the boundary of Mexico are members of appellant local. (Tr. 2.)

Although the present case is concerned only with the business of fishing for fresh fish market dealers, members of the Local include fishermen on all small boats either that fish for cannery fish or for market fish. The Local considers itself a cooperative of workers, and in keeping with this policy only working fishermen are admitted to membership. Ownership of a share of a boat does not render the applicant ineligible; but absentee owners who invest in a vessel for profit and do not themselves actually work are not admitted. The reason for this policy was thus stated:

> "With regard to the small boat fishermen, they make their entire earnings, or substantially all of their earnings, out of their share as working fishermen. Their investment in the boat, or in a boat, when they buy a vessel their investment in that boat, that is, the small boat fishermen, is primarily an investment in a boat for the purpose of using the boat for its use value." (Kibre, Tr. 1404, 1180-1181, 1374, 1370-1375.)

In accordance with this policy an applicant is not admitted unless he has had, or until he gets, a job working on a boat. (Government Exhibit 13.)[1]

The scope of activities of Local 36 is indicated by the following: Of the 450 small boats which fished out of San Pedro, the Union had members on 175. Of these 175 boats, 25 were one-man boats, 105 were two-man boats, 25 were three-man boats, and twenty were four- or five-man boats. *Only 20* of the 450 small boats spent full time fishing for fresh market fish, 90 spent part time on fresh fish, and the remainder fished exclusively for the canneries. (Zafran, Tr. 1517-1520.)

About sixty per cent of the members of Local 36 do not own any interest in a boat. Only five of the fourteen individual defendants owned a boat at the time of the events in question. Four of the defendants had never owned a boat. (See Appendix B, pp. 3-5, for additional economic data.)

B. Compensation of Fishermen.

Each member of the crew, whether he fishes or cooks, receives a share of the catch for his labor. The owners of the vessel and the owners of the gear receive shares of the catch for the use of the vessel and the equipment. (DiMassa, Tr. 425-427, Falcone, Tr. 485.) Fishermen consider their share of the catch as wages. (Govt. Ex. 201.)

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[1]It was testified that the fishermen are manual workers deriving their income from their physical labor. (Anderson, 870-873; also Def. Ex. BB, 1423.)

The owner is obliged to spend the boat's share in maintaining the boat. The boat owner (as distinguished from the members of the crew who are not boat owners) usually spends several months each year working on the boat to keep it in condition. (Smith, Tr. 1474-1477; Knowlton, Tr. 1583; Munson, Tr. 1696; Hill, Tr. 1707.)

While the Court refused defendants' offer of proof as to fishermen's earnings (Tr. 1498-1499, 1500; 1663-1665; 1716-1720), government's witness Castagnola testified he earned $2800 between June 6, 1946 and March 24, 1947 (Tr. 1549).

Boats are not profitable for investment. One dealer purchased several boats because this was the only way he could get swordfish; his boats have never been profitable; he used the money which he got for his share of the boat to maintain the boat, and it was not enough for that purpose; he wanted to get rid of the boats as soon as possible. (Naylor, Tr. 926-927.) Ownership of nets is likewise not profitable. (Naylor, Tr. 932-933.)

Out of season, fishermen must get other work to make a living. One dealer testified that he gave the fishermen employment for this reason, saying:

> "A. Oh, yes, Heavens yes. We have the fishermen, and we either have to give them something to do or feed them, one or the other, so we hire them to work in the market, and we hire them to work on nets during the off season when there are no fish.

Q. They have to do that in order to continue to eat during that off season?

A. Well, they have to do something to eat * * *."

(Naylor, Tr. 933-934.)

C. Distribution and price.

Fishermen sell only to the wharfside dealers, who in turn resell to wholesalers, either in downtown Los Angeles or elsewhere. Wholesalers in turn frequently resell to other wholesalers. Fish pass through two to five hands before reaching the consumer. Most of the fish handled by the dealers in San Pedro is resold to other wholesalers. (Kibre, Tr. 1214-1216.)

There are only nine fish dealers in San Pedro; two in Santa Monica; not more than five in Newport Beach, a total of sixteen possible purchasers of the fishermen's catch.

But at any given time all of the dealers in any port pay the same price for fish. (See Appendix C. p. 6.) Dealers do not bid against each other. One fisherman, on being asked how the price of the fish he sold was determined, answered: "Well, I don't know how it was determined. At the time I had the boat I took whatever they gave me." (Phelps, Tr. 1606.) When a fisherman goes out to sea, he can ascertain the price of fish at that time, but he has no assurance that it will be the same when he brings the catch to port. (Kennison, Tr. 1449-1450.) There is evidence that at least one dealer (Naylor) fixed a price in advance, but even he let the fishermen take

the risk when the market was "wobbly". (Naylor, Tr. 1949.) Sometimes when the fisherman returns to port the dealers refuse to take the fish at any price. (Lackyard, Tr. 1700.)

D. Fish prices.

Generally, the price of fish is determined by the volume caught at the time. The amount of fish caught elsewhere affect the price of fish in Southern California. (DiMassa, Tr. 415, 434-435.) As a food, fish competes with meat, dairy products and other produce, and the price of fish is affected by the prices of these competitive items. (Di Massa, Tr. 435.) By reason of a change in the supply of barracuda, the price of it has been known to drop from 28¢ to 4¢ a pound in a period of a couple of days. (Hill, Tr. 1710.) Prices dropped frequently while fishermen were out at sea bringing in the catch. (Kennison, Tr. 1450.)

A government witness testified that for the past seven or eight years the price of cannery fish has been pretty well stabilized, but that the price of fresh market fish has fluctuated frequently and sharply. During this period he has seen rock cod when prices were so low that it hardly paid to bring them in. (Scofield, Tr. 708-713.) These factors perhaps explain the testimony of one witness that he spent about four months each year fishing for fresh market fish and about six months fishing for cannery fish, but that his income from the former was three times as great as his income from the latter. (McComas, Tr. 1597-1598.)

The catch of fresh market fish in Southern California is extremely low compared with other areas. The total catch in the Southern California area is less than the catch in a single port in Northern California, such as the Port of Eureka. In 1946, approximately 25 million pounds of fresh market fish were landed in Eureka; in 1938 or 1939 the catch was 5 million pounds. In Seattle in 1938 the catch was 2 million pounds; in 1946, the catch had increased to 33 million pounds. During that same period in Southern California, the catches ran much the same from year to year, with variations due to the availability of a given species of fish, but without any decided increase. During the same period in Northern California, the catch has increased about five times, and there has been a steady upward trend. (Kibre, Tr. 1229-1230.)[2]

E. General conditions of the industry affecting economic strength of fishermen.

When a fisherman puts out to sea, he does not know the price he will get for his fish or even whether he will have a buyer. (Tr. 338-339.) He does not know what or how much fish he will get. (Tr. 714-715.)

Loading facilities and trucks necessary for delivery of fish are owned by the dealer; unless the fisherman can make arrangements with a dealer to handle his catch, both in unloading and in delivery, he cannot

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[2]Evidence was offered that in those ports where the catch had increased, there had been price stabilizing agreements during the period of the upward trend. Such evidence was rejected by the Court. (Kibre, 1231.)

sell his fish at all. (Jones, Tr. 776; McComas, Tr. 1601-1602.)

Fishermen are subject to many state restrictions on their fishing activities. The kind of gear that a fisherman may employ for catching certain species is regulated by the Fish and Game Code. Thus, in Southern California a certain type of gear known as drag gear, commonly used to catch bottom fish, is prohibited. The same code restricts the areas in which fishermen may operate, and also puts seasonal limitations on fishing for certain species.

The uncertainties are also affected by the natural restrictions upon a fisherman's pursuit of his occupation. Fish runs are unpredictable; they vary from season to season and from year to year, and sometimes they do not run for more than ten days. During that short period the fishermen must harvest and sell to the dealer his catch of that particular species. The dealer, however, stores a large part of the fish and sells it all year around.

The fisherman is required by the State Fish and Game Code to dispose of his catch without permitting any of it to deteriorate. Violation of this rule constitutes a criminal offense and basis for revocation of the indispensable license to fish. (Kibre, Tr. 1216-1223.)

The fishermen have no facilities for storing the fish, and must dispose of it shortly after bringing it into port. (Icing facilities on a few of the boats maintain the fish while the boat is at sea, for a period

of from four to eight days. Re-icing is not possible, and when the fisherman comes in he must sell his fish immediately. Furthermore, fish must be stored at constant temperature, which can be maintained only in a refrigeration box. (Smith, Tr. 1486-1488; Phelps, Tr. 1608).)[3]

The foregoing facts explain what the fishermen wanted, why they wanted it and why they were willing to strike for it. The fishermen sought one thing: contractual assurance of the price for their catch *before* putting to sea. The reason is simple. Coming into port with a hatch full of fish, the fisherman is not in the position of a vendor. A vendor ordinarily has a choice of whether he shall sell or not. Not the fisherman. He has no storage facilities. He is therefore compelled by law to sell. Under the California game laws, he does not even have title. His only alternative to selling is to eat his catch himself. He is

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[3]Certain other testimony on this subject was rejected, although defendants offered to prove that a fisherman as a matter of practice, cannot and does not ice fish and hold it on his boat, because it is too expensive and it ties up his boat, because he doesn't have any money reserves and therefore cannot hold the fish and sell it at a time when the market is ripe, that he has to dispose of his fish in order to get other money to continue living and to be able to go out and fish again; that a fisherman does not store and ice fish with an ice company because it requires a truck and a place to unload, and he doesn't have either, and in addition there is a question of obtaining storage facilities which is a difficult one. In any event, the fisherman finally has to end up by selling his fish to the same dealer to whom he would have sold it in the first place, and the only advantage in holding fish is to the dealer who waits for the right kind of a retail market and who makes the price on the retail market by withholding this fish from sale. (Tr. 1716-1717.)

forbidden by law to dump it into the sea. He must dispose of it to dealers. He is therefore not a vendor, at least not as the term is commonly understood. His opportunity for choice exists only before he puts out to sea. If he is unwilling to hazard the sea at the prices obtainable he can stay in port. With a boat-load of fish he has no choice other than to sell at the prices offered.

For these reasons the agreement sought by the union, although it left every price open to negotiation on 24 hours' notice, did not permit any change to be effective as to any boat which was at sea until it had disposed of the catch made in reliance on prices in effect when it put out.

The entire case hinges about the collective efforts of the appellants to get such an agreement.

F. The status of the fresh fish dealer.

The dealer is a businessman. As one dealer testified, "We are the ones who move it (fish). The fishermen can't. We are only what you would call the entrepreneur, if you would call it that way, the in-between." (Ross, Tr. 259.) Each of the dealers has storage facilities of his own and in addition has arrangements with a cold storage warehouse. (Vitalich, Tr. 289-290; 373-374; Di Massa, Tr. 396, 432-434.) The chief customers of Union Ice Company are fish dealers and brokers. These customers use most of the warehouse capacity. More fish brought in at one time merely uses up the existing storage capacity. Thus, when there are such large quantities of fish that the

dealers cannot handle it, there are no storage facilities available for the fishermen, even if they were otherwise in a position to utilize such space. (Jorgensen, Tr. 565-568.)

Fishermen are poor people. It is a general practice among dealers to lend money to fishermen and to finance them. Arrangements are made by the dealer to get a share of the catch, or in any event, the dealers have "a pretty good idea" that the fishermen-debtors will sell their fish to that dealer. (Di Massa, Tr. 382-383, 417-418.) Thus, some of the fishermen testified that they sold their entire catch to the creditor-dealer; others gave such dealers first refusal on the catch. (Souder, Tr. 810-811; McLauchlan, Tr. 1623-1624; Hill, Tr. 1713.)

The following illustrates the captive-fisherman's attitude toward his creditor:

> "Q. Are you under their (the dealers') control or direction in any way?
>
> A. I was at the time of the strike. I owed George——
>
> Q. I beg your pardon?
>
> A. At the time of the strike I did owe a little money.
>
> The Court. To whom?
>
> The Witness. To George Naylor Bayside Fish Market.
>
> The Court. How much?
>
> The Witness. It was around $100, somewhere around there." (Souder, Tr. 804.)

Further detail on this subject is given in the Appendix, D, page 7.

G. Local 36 as a Labor Union.

Local 36 is affiliated with the Congress of Industrial Organizations. The Constitution of the Local, Exhibit Y, states one of its objects: "to aid in building an industrial organization of all fishermen, and allied workers, and to promote the interests of the labor movement as a whole." (Article II.) The oath of allegiance contained in Article IV of the Local's constitution requires a promise of allegiance to the principles of the International Union and of the Congress of Industrial Organizations, and a promise not to discriminate against a fellow worker on account of creed, color, politics, race or nationality, a promise to assist all members of the organization to obtain the highest wages or financial return possible for their work, not to accept "a brother's job who is idle for advancing the interests of the union"; the said oath is based upon the stated premise that only by standing together can workers improve their lot and be able to enjoy the fruits of their labor. The Constitution provides for representation in the local council of the C.I.O., (Article VI, Section 12); it sets up a procedure for calling strikes and provides that while a strike is in progress, no member "shall perform any act, in the performance of which, he shall jeopardize the dignity or welfare of the Union" (Article XVI, Section 4); it sets up a steward system for the handling of grievances and the performance of other duties generally performed by labor union stewards. (Article XXI, Section 9-12.) The Constitution and By-laws are typical of those generally adopted by labor organizations.

At one meeting the following labor union business was handled: the election of delegates to the Los Angeles C.I.O. Council; taking action with respect to F.E.P.C. legislation and the Case bill. (Govt. Ex. 230.) The Local has been active in C.I.O. political activity. (Govt. Ex. 402; Kibre, Tr. 1378; Govt. Ex. 301.) In its own affairs the Local sought and obtained support of other labor organizations. (Govt. Ex. 233.) In the strike involved in this case the Local sought and obtained the aid of a United States Labor Conciliator to help reach a settlement, and asked for help from the C.I.O. and affiliated unions. (Zafran, Tr. 1545; Def. Ex. DD.)

H. Local 36 as a Cooperative Marketing Agency.

Because its members are "working producers" in the fishing industry, much of the work of the Local is the cooperative effort of the members in marketing fish. In considering arguments based on the Fishermen's Cooperative Marketing Act, the following facts are most significant: Each member of the Local has one vote and only one vote, and he receives no dividends whatsoever. (Kibre, Tr. 1182-1183.) Article II of the Local's Constitution, Exhibit Y, states as an object of the Union, the promotion of "equitable conditions of marketing of all fish caught by its members". Other objects are: finding adequate outlets for all fish caught by the members of the Local, providing proper controls of fishery resources, and the promotion of the welfare of the fishing industry as a whole.

Local 36 relied upon, and acted pursuant to, the Fishermen's Marketing Act. This is shown by the negotiations between the Local and the dealers and by the proceedings of the Local itself. (Govt. Ex. 201.)

Although the Local does not own or operate any dockage, processing plant, or icing plant, (Kibre, Tr. 1395-1396) it does much work relative to catching and marketing. Thus, when port dealers would not buy fish, the Local arranged to have the fish delivered to a dealer in Los Angeles. (McKittrick, Tr. 1759.) It concerned itself with problems of production and of disposal of particular species of fish (Govt. Ex. 301; McLauchlan, Tr. 1627-1628), getting gasoline, and cutting kelp (Govt. Ex. 402.) It developed a program for obtaining adequate mooring facilities and improving the shelter for fishing boats. (McLauchlan, Tr. 1644, Govt. Exs. 307, 220.) In all of its contracts, it dealt with the problem of obtaining correct and fair weights. It arranged for a weighmaster on a fishing barge, and when its members were shortweighted, the Local worked out a settlement for the amounts due. (Govt. Ex. 320; Kibre, Tr. 1254, 1256.) At a conference called to deal with marketing barracuda, it tried to work out a marketing program of advertising in Los Angeles and to ship excess fish to other countries. It considered, among other things, cookery demonstrations, contacting C.I.O. and Parent-Teachers Association organizations, radio broadcasts, an "Eat Fish Week", urging butchers properly to handle fish, giving away a toy balloon with fish sales, and the like. (Govt. Ex. 201.)

At the convention of the International with which Local 36 is affiliated, in January of 1946, a resolution was adopted directing all locals on the West Coast to participate in a marketing program in the Los Angeles market area. In accord with this resolution, Government agencies such as the Federal Fish and Wild Life Service, and particularly the Market Service Division of that agency, were asked to participate by the Local. Meetings were held in Seattle and in Los Angeles in which dealers were invited to and did participate. The chairman and other officers of the Western Seafood Institutes, Inc., a Los Angeles organization of fish dealers, took part in these meetings. Because of the lack of cooperation on the part of the dealers, these efforts failed. (Govt. Ex. 201; Kibre, Tr. 1309-1317; Zafran, Tr. 1549-1551; Hinkle, Tr. 1667-1678.)

Such activities have been carried on for many years. For example, in 1944, Local 36 circulated a letter to all Southern California fish dealers urging the adoption of a program to establish the basis for volume handling of fresh fish, which would mean the development of a regular fishing fleet to be available to fish all year around and to harvest the fish as it runs, to provide for additional facilities for the boats so that they could be properly taken care of in San Pedro, to develop a system of quality control from the point of delivery to the dealer to sale to the consumer, and a program of sales promotion to materially widen the market for fish. (Defs. Ex. O; Kibre, Tr. 1419-1420.)

I. History of collective bargaining in the west coast fishing industry.

The object that led first to the organization of the Fishermen's union was getting a minimum price for cannery fish. In the San Pedro area, organization commenced in 1934 as the Fishermen's and Cannery Workers' International Union. Efforts at effective negotiation have met with the usual difficulties in establishing basic agreements; but the 1943 decision of Judge McCulloch, holding that collective efforts of fishermen to get minimum prices were not in violation of the anti-trust laws, first spurred effective activity in Southern California. Notwithstanding this decision, dealers from time to time refused to negotiate. As will be related in more detail, it was for the purpose of getting a decision by Federal agencies on the question whether a basic agreement between fishermen and dealers was lawful that the strike was called. (Further detail concerning the history of the organization is given at Appendix E, pp. 8-9.)

J. The strike.

The 1946 strike, which is the subject of the indictment, arose out of the efforts of Local 36 to get an agreement with the fish dealers, and out of the protest by the fish dealers that such an agreement would violate the Sherman Act. The fish dealers suggested that if the fishermen would call a strike, this would prompt federal authorities to make a ruling on the question. (Zafran, Tr. 1532.) The fishermen called the strike in response to the suggestion "to expedite matters and get a decision from the government

agency in reference to the legality of signing a minimum price agreement." (Zafran, Tr. 1531.)

1. The Purpose of the Strike.

The primary object of the strike, embodied in the proposed agreement, was a method by which the fishermen would be assured of a price before they put out to sea. (Ross Tr. 193.) In a negotiation with the dealers Kibre said:

> "It is not a matter of signing a particular contract that we should be concerned with, but what we are interested in is trying to work out some form of agreement here which will give the fishermen some measure of security so that they will know what they are going to get when they go out to make their catches, and that we felt that such a measure of security was indispensable to the bringing about of a sound relationship of the fishermen and the dealers in this area so that we could then go ahead on a full-fledged marketing compaign."

The immediate impetus for striking was the wish of the fishermen and the dealers to get a decision by government agency which would permit the parties to negotiate. The fishermen were willing to rely on the decision of Judge McCulloch which has been here referred to; but the dealers contended that they were under the stricture of a cease and desist order, and that the only way to clarify their position would be for the fishermen to strike so that they could get a ruling from a government agency. (Further details concerning the calling of the strike and the ngotiations is given at Appendix F, pp. 10-15.)

2. The Proposed Agreement.

In May of 1946, Local 36 proposed a collective marketing agreement and submitted it to wharfside dealers in Southern California. The proposal (which is attached to the indictment as Exhibit A) covers two general subjects: marketing and price regulation. Concerning the former, provision is made for cooperation between dealers and fishermen. As to the price, the agreement proposed was essentially one to fix a method of price determination, rather than to fix prices. Although prices were fixed as to some fish, they were subject to renegotiation on twenty-four hours' notice, with arbitration in case of disagreement.

The agreement provides the dealers shall assist the fishermen in the marketing and distribution of fish. It establishes a food production and distribution committee to implement the agreement, and to work with government agencies in order to secure the maximum production of fish, to secure proper and efficient production, to maintain prices in accordance with national administration policies to combat inflation through stabilized prices, and to inform the public of the many ways in which fish can be appetizingly used. Dealers who sign are to be given equal and first preference in the purchase of fish.

Payments are to be made weekly. The union is to furnish fish weighers and inspectors of weighing apparatus. OPA prices are to be minimum prices even after controls are removed; where there are no OPA

prices the prices are to be set by agreement. All prices are subject to renegotiation on twenty-four hours' written notice. During that twenty-four hour period, and for all vessels out at sea at the time that the notice is given the contract price is to be effective. If prices cannot be agreed on, they are to be arbitrated.

All of the San Pedro dealers and some of the Newport Beach dealers refused to sign the agreement. (Zafran, Tr. 1570-3.)

K. Union activities during the strike.

From May 20, to July 1, 1946, the Union maintained pickets at dealers' places of business and at the wharf. (Cave, Tr. 131-6; Vitalich, Tr. 313-17; DiMassa, Tr. 397-400; Castagnola, Jr., Tr. 453-5.) During that period no fish was landed at San Pedro. (Ross, Tr. 159-60.) One dealer at San Pedro closed up his place during the month of June and except for one sale of fish did no business that month. (Vitalich, Tr. 317-18.) Another dealer in Newport Beach complained that although he continued to do business while his place was picketed his customers were told that he was unfair. (Naylor, Tr. 857-9.)

After the first few days of the strike all deliveries made by the dealers themselves stopped so far as the San Pedro waterfront was concerned. (DiMassa, Tr. 400.) The American Railway Express delivered some fish to San Pedro dealers; but the union maintained a picket line and, at the suggestion of an express com-

pany's representative, sent a letter to the company; as a result the express company did not pick up any fish from the San Pedro dealers. (Ross, Tr. 161-4, 171; Smith, 1484-5, 1492-3.)

The drivers of ice trucks refused to go through the picket line on the first day of picketing. The union gave permission to the drivers to cross the picket line for the purpose of delivering such ice as was needed to preserve the fish already on hand. (Smith, Tr. 1481-2, 1489.)

The union denied making any threats whatsoever. (Gasio, Tr. p. 876-92; Smith, 1485-6, 1493-5.) Local 36 notified dealers in San Diego and other places that certain Newport Beach dealers were unfair. (McLaughlin, Tr. p. 1661.)

During the strike the union issued clearance cards to designate that the holders had complied with the policy of the organization. To get a clearance card the fisherman had to stand picket duty. If a fisherman went from one point to another, his card indicated that he had complied with the policy of the organization. The union asked during this period that those who signed clearance cards sell only to "fair" dealers. (Zafran, Tr. 1552-3, 1573-5.)

One fisherman testified that he dumped a load of anchovies because the place where the anchovies would have been sold was picketed, and the anchovies spoiled before he could make arrangements for their unloading. (Jones, Tr. 776.) There was also testimony

that tons of anchovies are destroyed every year. (Lee, Tr. 790.)[4]

1. **Effect of Defendants' Strike Activities Upon Flow of Fish in Commerce.**

There is no evidence that the strike activity affected the movement of fish in commerce. At the beginning of the strike, dealers and the union knew that there was an unusually large amount, an oversupply, of fish in storage. (Exhibits 201, 302.) The fact is that there is about four times as much fish sent into San Pedro as is brought in by boats at San Pedro. (DiMassa, Tr. 436.)

After the first few days of the strike during which deliveries to dealers by the American Railway Express was as usual, incoming fish was delivered by that company to its depot and was picked up there by the dealers who took the fish to the wharf. In addition, the dealers took fish from their places of business by their own trucks to the express depot in San Pedro for shipping. (Ross, Tr. 168-73; DiMassa, Tr. 401-2.) After June 1st, fish destined for the San Pedro dealers was delivered by motor truck companies to the Union Ice Company where it was picked up by the dealers in their own trucks. (Ross, Tr. 172-3; DiMassa, Tr. 401-2; Jorgensen, Tr. 564-5; Kersbergen, Tr. 642-3; Underwood, Tr. 820-3; Simpson, Tr. 656-7.)

[4]There was a running objection to all of the testimony concerning the methods used by the union in connection with the dispute, on the ground that the methods used were incompetent, irrelevant and immaterial and that the only question was the legality of the agreement which they sought to put into effect. (Tr. 406-13.)

During the war, all fishermen fished out of Newport instead of San Pedro. (Tr. 493-4.) During the strike, the fishermen did the same thing. (Castagnola, Tr. 445, 453; Bogdanish, Tr. 488.) Thus, for example, one government witness testified that during the entire period of the strike, he fished seven days a week. (Jones, Tr. 177.) In addition, fishing went on in San Diego as usual. There the price was set each morning and was the same throughout the day for the fish that was brought in that day. The price was set by negotiation between the union and the dealer. (Zafran, Tr. 1556-7.) Some fishermen who fished for shark, hauled their products to Los Angeles. (Sawyer, Tr. 1466.) Likewise during June, the American Railway Express continued to ship fish in and out of Los Angeles just as it has done at all other times. (Tr. 584-5.)

Despite the picket line, some boats delivered fish to dealers against whom the strike was in effect. (Naylor, Tr. 860-2.) Many boat crews went fishing without getting clearance cards; nothing was done about it by the union, except to place boats on the unfair list. The effect of this was that the union members would not give fishing information to such crews, would have nothing to do with those members, that is, they "cut them dead." (Kennison, Tr. 1452; Zafran, Tr. 1553, 1546-7; McLauchlan, Tr. 1613-17, 1638-9, 1651-8, 1680-4, 1634-5; Gov't. Ex. 328.) Such boats got fuel and other supplies without interruption. (Zafran, Tr. 1560-1.)

Early in June there was an unusual occurrence. Albacore, which ordinarily does not make an appear-

ance until July, was discovered in coastal waters. (Kibre, Tr. 1356-8; McLauchlan, Tr. 1640-1.) Albacore is the highest priced fish available for fishermen, and when it appears, fishermen drop other activities and go out for albacore. (Ross, Tr. 272.) That is what happened during the month of June. (Pizzo, Tr. 556.)

Despite the appearance of albacore, more fresh fish came into Newport Beach in June of 1946 than in any other year. McLauchlan, Tr. 1624-5.) The Fish and Game Commission kept figures for only the last fifteen days of June and during that period there was about as much fish delivered at Newport as during any other entire month for which records were kept. (Tendick, Tr. 1035-7.)

During the month of June almost twice as much fish was frozen as in the previous month. (Tendick, Tr. 1052.) In addition, twice as much fish came in from Mexico in June as came in in July 1946. (Tendick, Tr. 1054-6.) There was no evidence whatever that the overall amount of fish in interstate commerce in the Southern California area was affected by the conduct of the defendants.

L. Offers of proof.

The Government objected to evidence offered by the defense on numerous matters. Accordingly offers of proof were made. Because they are deemed essential to a proper disposition of this appeal their substance is given here and at Appendix G, pages 16-30.

The defendants offered to prove through an economist and specialist in agricultural marketing and

economics, who had made a special study of the problems of cooperative marketing in the fresh fish field, the following:

That joint action on the part of a group of primary producers of a seasonal and perishable product to improve the prices they receive is not harmful to consumers, but rather is beneficial. A primary producer, as is the fishermen involved in this case, is the one who in effect brings the product into existence. Technically he is a small scale producer, very much in the same position as an individual farmer. The output of a large number of such producers is necessary to meet the needs of consumers in the market. While a fisherman does require a certain amount of equipment, in order to perform his work, he is more accurately described as a labor producer than as a capitalist or entrepreneur. His most important investment is the labor, that is, his time which he risks in the hope of receiving a return. Although he is not under the direct control of an employer, he generally sells to one or a small number of buyers and is much in the same position as a small farmer dealing with a cannery or canneries. To a great extent, he is under the control of the one who buys his product.

The ordinary manufacturer is not a producer in the same sense as a fisherman or farmer who brings a commodity into existence for the first time. A manufacturer processes a product. In the case of the fisherman and the farmer, nature largely does the processing and therefore the processing factors are not subject to a great deal of control.

The total volume of commodities available for sale and the time at which they are available is not subject to the control of the producer.

The fisherman, who like the farmer, is a producer of a highly perishable product, must sell immediately. Because of his economic status and because of his lack of storage and other facilities, he cannot hold on to the product for a better price. Because of these and other factors enumerated, the original producer is in an inferior economic position. The man to whom the fisherman and the farmer sell their product is an entrepreneur who risks primarily his money in the hope of making a profit. In his case, the time invested in carrying on his transactions is the minor and insignificant part of his operation. The buyer typically operates on a much larger scale than the fisherman or the farmer and generally makes purchases from a considerable number of producers. He has control in the nature of an employer in that he decides the type of product, the grade of product, the quantity to buy, and whether and when he will abstain from buying. While the fisherman is usually limited to fishing for one species of fish at any time by reason of the equipment and facilities available to him, the dealer deals in many varieties simultaneously. Thus, the dealer gets supplies of fish even when fishermen engaging in seeking certain species obtain no catch whatsoever. The buyer has the further advantage that he may and does receive supplies from distant points and is therefore not dependent on the output of any one

fisherman. For these reasons the buyer is in a much better bargaining position than is the fisherman.

For the buyer the problems created by the perishable nature of the product has been solved. He can afford storage facilities, because his volume is normally adequate to justify this investment. This, again, improves the bargaining power of the buyer.

The dealer is not a consumer. The consumer, having a choice between numerous food products with the same general qualities, is in a dominant position. Generally speaking, a decrease in price results in a more than proportionate increase in volume of purchases and an increase in price results in a more than proportionate decrease in volume of purchases by the consumer. The price to the consumer is not determined by the price which the dealer pays to the fisherman.

The fisherman once he brings fish to the place of sale has no withholding power and consequently the sale is like a forced sale. In this kind of a market, wide fluctuation in prices from season to season and even from day to day is common.

The further factor that the buyer may have supplies in storage makes him independent of any individual fisherman.

The effect of all this is that when many fishermen have a small catch or no catch at all the price is high, and as soon as the price drops to a low price, the catch is reduced because the return is insufficient.

The consumer does not gain by low prices to the producer, because the low prices to the producer are set by the supply of fish coming in at any particular time, whereas the dealer can store the food and need not sell. In fact, the weak bargaining position of the producer tends to lower prices to him, reduce the amount of fishing, and therefore, the supply of fish; the overall reduction in the supply of food tends to increase prices to the consumer.

The effect of combinations of fishermen or farmers to secure higher prices is that buyers must bid actively or possibly agree on a price in advance in order to secure ample supply; it improves the bargaining position of the producers. They still have to meet the risks of weather, lack of fish, etc. A price increase to the producers generally results in an increase in the volume of produce available to the consumer, but not in an increased price for the simple reason that the consumer is free to shop around and refuse to purchase except at prices comparable with competing commodities. The adjustment is made in the marketing margin of the dealer. They are not helpless, however, because where any adjustment they have to make is excessive, they still have the alternative of seeking supplies elsewhere.

Collective bargaining associations are common in the agricultural field. Such associations negotiate with private market operators over the price, terms of sale, and other business arrangements involved in selling the product of its members. Such a collective

bargaining association does not handle the product of its members. There are a number of such bargaining associations among primary farm producers in California. In the instance of collective bargaining associations which have actually been sponsored by the Government, there are present none of the manifestations of monopoly which are frowned on by society. Supply is not reduced but the exact opposite is accomplished.

> "Collective action on the part of primary farmer producers has been encouraged and has been found socially desirable. The same type of encouragement extended to the fishermen primary producers would be likely to have the same results."

For summaries of other offers see Appendix G, pages 16-30.

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 9, p. 2581.)

A. THE COURT GAVE ERRONEOUS INSTRUCTIONS AND REFUSED TO GIVE CORRECT INSTRUCTIONS WITH RESPECT TO THE FISHERMEN'S MARKETING ACT, 48 STAT. 1213, 15 U.S.C. 521.

1. The Statute.

The Fishermen's Marketing law provides:

> "521. Fishing industry; associations authorized; aquatic products defined; marketing agencies; requirements.

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term 'aquatic products' includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

and in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount

greater in value than such as are handled by it for members."

2. Instructions given by the Court.

With respect to the Fishermen's Marketing Act, the Court instructed the jury as follows:

> "*If you find as a fact that the fishermen members of defendant Local 36 are independent businessmen who are engaged in the business of catching and selling fish to dealers on and for their own account and profit, and that they sell their catch directly to buyers, then I charge you as a matter of law that a conspiracy or combination as alleged in the indictment of any such fishermen for the purpose of fixing, establishing and maintaining the price at which they shall individually sell their fish,* and to prevent the buyers of fish who refuse to pay the price so agreed upon among the fishermen members of defendant Local 36 from obtaining fish from sources other than the members of defendant association *constitutes a violation of the law, and that any and all individual defendants herein who you find have been members of or participated in such combination or conspiracy for the aforesaid purposes would be in violation of law as charged in the indictment.* * * *
>
> The Fish Marketing Act, which has been referred to during the trial of this case, reads in its material portions as follows: (The Court then read the Fishermen's Marketing Act as set forth above.) * * *
>
> *　　*　　*　　*　　*　　*　　*
>
> As a matter of law, persons engaged in the business of catching fish for sale and profit may

act together in an association in collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by their members. *When formed for such purposes, such an association may, on behalf of its members, enter into a contract with a buyer of fish which provides for and fixes the price at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer."* (Emphasis ours.) (Tr. 1939-42.)

The italicized portions of the instructions are those to which defendants' objections, as far as the Fishermen's Marketing Act is concerned, were directed. The grounds thereof being: First, in order to qualify under the Fishermen's Marketing Act it is not necessary, as indicated in the instructions given, that the association engage in more than one of the activities permitted by the statute; an association may engage in collective marketing only and qualify under the Fishermen's Marketing Act. Second, it is not necessary, as indicated in the instructions, that an association in order to qualify under the Act must act either as sales agents for its members or sell on their behalf. It is sufficient if the association acts as the collective bargaining agent of its members.

See Appendix H, pages 31-32, for specific objections raised by defendants.[1]

[1]The trial Court ruled that the argument presented might be considered as objections without being specifically set forth in objection form. (Tr. 1868.)

3. The instructions refused.

See Appendix I, pages 33-34, for the instructions refused on this subject.

The defendants objected to the refusal to give these and other instructions proposed by the defendants on the grounds that each of the instructions constituted correct statements of law. (Tr. 1919.) The proposed instructions clearly state: First, that an association may qualify under the Fishermen's Marketing Act by engaging in collective marketing only; and second, that an association engaging in collective bargaining on behalf of its members is collectively marketing within the meaning of the Act.

4. The applicability of the Fishermen's Marketing Act under the evidence presented.

The Fishermen's Marketing Act does not exempt fishermen from the provisions of the Sherman Anti-Trust law; however, it does exempt *certain activities* of fishermen. These activities include the association of fishermen together for the purpose of marketing fish, and such marketing necessarily involves price fixing because marketing without fixing of a price is obviously impossible.

The defendants herein are "persons engaged in the fishing industry, as fishermen * * *", acting together in an association as permitted by the law. The law requires no particular form of association; it may be "corporate or otherwise, with or without capital stock."

A consideration of the legislative history of the Fishermen's Marketing Act is relevant to a determination of its applicability herein. When the Act was adopted in 1934, the House Committee reporting on the bill said:

> "The purpose of this bill is to provide for the fishing industry co-operative associations such as are provided for farmers by the Capper-Volstead Act." (1934 House Report No. 1504.)

The report refers to the serious situation in the fishing industry analogous to that in the agricultural situation. It points out that the industry must compete with foreign subsidized fishing industries. Then it goes on to quote the testimony of R. H. Fiedler, Chief of Division of Fishery Industries, U. S. Bureau of Fisheries as follows:

> "The fishing industry of the country like that of farming is sorely depressed. It is operating in a most disorganized fashion and as a result of this there exists an unstable price level and customary marketing channels are ineffective in moving production. The fishermen are receiving low returns and consumers are paying relatively high prices for fishery products.
>
> * * * * * * *
>
> "As a corollary to this disorganized situation, and because credit has dried up, during the emergency, we have witnessed the industry indulging in destructive price cutting and other detrimental practices which have reflected largely on the fishermen, resulting in lowering income to the point where their very livelihood is in jeopardy.

> Thus the evils which the administration is trying to correct are particularly apparent in the fishing industry, namely, the volume of the products of the industry in interstate and foreign commerce has been diminished; the capacity of production units has been decreased; *the necessity for organization among trade groups is everywhere apparent* (committee's emph.), and, because of destructive price cutting, the purchasing power of fishermen and processors has been reduced; thousands of earners have been thrown out of regular employment, and one of our great natural resources is being exploited unwisely * * *."

Finally, the report says:

> "Our fishermen are burdened with debts and mortgages. They engage in an industry which involves hardships and dangers which do not attach to any other industry. They are just as badly in need of help as the farmers. The fishermen are really the forgotten men in this country, the term certainly applies to fishermen."

Despite the refusal of the Court to permit proof with respect to many of the problems of the fishermen, the record here clearly reveals a fishing industry operating in a most disorganized fashion with unstable price levels, the fishermen receiving low returns and the consumer paying relatively high prices, and with destructive price-cutting, reflecting primarily on the fishermen and resulting in such low incomes that the very livelihood of the fishermen is in jeopardy. It is precisely these conditions at which the Fishermen's Marketing Act was directed, and which the

defendants in this case sought to overcome by organizing themselves into an association and engaging in the activities for which they were prosecuted and convicted.

Inasmuch as the Fishermen's Marketing Act is based upon the Capper-Volstead Act and is intended to accomplish for fishermen the same general objectives as the Capper-Volstead Act was designed to achieve for farmers, reference to the debate on the Capper-Volstead Act is helpful in the interpretation of the Fishermen's Marketing Act. In that debate, Senator Walsh stated that the purpose of the act is to permit the fixing of prices by a combination "unless the result of the combination is to unduly enhance the price of the product or create a monopoly." (Congressional Record, Senate, 1922, pages 2219-20). Here, the Senator referred to that portion of the Capper-Volstead Act which was in substance adopted in the Fishermen's Marketing Act, as 38 Stat. 1214, 15 U.S.C. 522, which section provides as follows:

> "If the Secretary of Commerce shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made

> directing it to cease and desist from monopolization or restraint of trade."

The section then sets up procedure for the enforcement of the stated policy.

It thus appears that the precise purpose of both the Capper-Volstead Act and the Fishermen's Marketing Act was to permit combinations which would control prices with the proviso that if prices were unduly enhanced by reason of such combination, the situation could be remedied by the procedure established by law. In the present case, no evidence was offered to establish that the prices obtained or requested by the defendants unduly enhanced the price of fish. As a matter of fact, offers of the defendants to prove the contrary were rejected.

In the case of *Columbia River Packers Assn. v. Hinton,* 34 Fed. Supp. 970, the plaintiff sought to enjoin the enforcement of a contract between itself and a fisherman's union, which contract imposed on all packers and canners parties to the contract the obligation not to buy fish from anyone not a member of the union. It was contended by the union that no injunction could be issued because a labor dispute was involved within the meaning of the Norris-La Guardia Act. This contention was overruled by the District Court and an injunction was issued. The Circuit Court reversed the District Court, holding that the Norris-La Guardia Act did apply, and then the Supreme Court in turn reversed the Circuit Court and affirmed the District Court holding the Norris-La Guardia Act

inapplicable. These cases will be discussed in greater detail under other sections of the brief. At this point, however, it is necessary to consider this case insofar as it applies to the Fishermen's Marketing Act. It should be noted first of all that the plaintiff in that case offered to negotiate with the defendants in accordance with past practice for a price to be paid on the season's catch, but refused to sign a contract containing the exclusive buying clause, and then went into Court asking for an injunction restraining the defendant from interfering with purchases of fish by plaintiff from any source. The only question involved was whether or not defendant union had a right to negotiate a contract with the plaintiff which would require it to purchase fish only from defendant union's members. The District Court did go on to point out that the union in that case was more properly classified as a cooperative marketing association than as a labor union, saying in this regard:

> " 'Terms or conditions of employment' within the meaning of the Act are not, in my opinion, involved in this controversy. Plaintiff refers to defendants as 'independent contractors', but defendant union has more aptly described itself in claiming the benefits of the Fishermen's Collective Marketing Act. It is truly a cooperative marketing association, and we look to the law of cooperative marketing rather than to labor law in the determination of the legality of defendants' acts.
>
> "Defendant's members are producers, just as cattlemen, grain growers, poultry raisers and

> orchardists are producers. Could it be maintained that a cooperative association of any of the types of producers named, having substantial control of production in their given field, could require of all buyers that they agree not to buy from any other producers, and could forbid and prevent their members by fines and other disciplinary measures from selling to buyers who did not thus agree to buy only from members of the cooperative?" (p. 974.)

After the final decision in the *Hinton* case, Judge McCulloch, the trial judge in the *Hinton* case, had presented to him, in a prosecution by the Anti-Trust Division, the question of the legality of a minimum price agreement.

In an unreported opinion in *United States v. Columbia River Fishermen's Protective Assn.*, No. C-16087 in the District Court of the United States for the District of Oregon, the Court said:

> "This case turns on the narrow question whether agreement on an opening minimum price to be paid for fish becomes unlawful when negotiated by the Fishermen's Union, which I will treat as a cooperative, with the packers as a group, rather than by negotiation with the packers individually. While *United States v. Socony-Vacuum,* 310 U. S. 150, would seem to require such holding as to the ordinary commercial transaction, I feel that the recognition given by modern federal statutes and decisions to the special and peculiar marketing problems of producers, including commercial fishermen, justifies me in holding that the practice of group bargaining,

> which has been so satisfactory on the Columbia River to fishermen as well as canners, is not subject to the criminal penalties of the Anti-Trust Act."

It should be noted that this is the only case in which the legality of minimum price agreements by fishermen has been tested. It is significant that in this case, the very District Court Judge who held that a fishermen's union could not sign a closed shop agreement, because such action constituted a violation of the anti-trust laws, and the Norris-La Guardia Act did not apply, also held that the law which was applicable was the Fishermen's Marketing Act and that under this law, a fishermen's union could properly negotiate an opening minimum price agreement.

The applicability of the act is further indicated by the various marketing activities engaged in by Local 36, as set forth in the statement of facts herein.

The only decided cases relating to minimum price agreements by fishermen hold that the Act is applicable, the legislative history of the Fishermen's Marketing Act and of its predecessor the Capper-Volstead Act indicate that the purpose of the Act is precisely to permit associations to establish minimum prices, and finally, the evidence in this case establishes that the defendant Local 36 and its members carried on the functions of a producers' marketing association.

For the foregoing reasons the defendants were entitled to have the jury instructed with respect to the

Fishermen's Marketing Act and any failure to correctly instruct with respect to such Act constitutes prejudicial error.

5. An association may qualify under the Fishermen's Marketing Act by engaging in only one of the permitted activities set forth therein. That is, by engaging in marketing alone.

The Fishermen's Marketing Act provides that an association as there defined may engage "in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce." This language is permissive. Nowhere in the Act is there any indication that in order to engage in any one of the permitted activities, the fishermen must engage in more than one or in all of them. To hold otherwise would be to require that in order to qualify under the Act, an association must engage in processing, as well as marketing, etc. Even the Government has not made this extreme contention.

The Capper-Volstead Act allows associations of farmers to engage in "collectively processing, preparing for market, handling and marketing in interstate and foreign commerce." The Court can certainly take judicial notice of the fact that there are many farmer cooperatives which do not engage in processing. The Capper-Volstead Act has never been construed to require that an association desiring to take advantage of its provisions engage in all of the approved activities. Thus, in the argument in the Senate on the Capper-Volstead Act, Senator Walsh of Montana said: "The Senator from Washington will

observe that under the provisions of both bills, the organization authorized must be an organization of the producers themselves of the products of the farm. They may engage in marketing that product or they may engage in processing it for the purpose of putting it upon the market, but the proposed legislation would exclude a combination of producers of condensed milk who do not themselves produce it."

Because the instructions given by the Court below indicated to the jury that for the defendant association to bring itself within the terms of the Fishermen's Marketing Act, it was necessary that it engage in several or all of the activities permitted by that Act, and because the Court refused to give instructions to the effect that an association engaging only in collective marketing might be entitled to the protection of the Act, the Court committed prejudicial error.

6. An association may qualify under the Fishermen's Marketing Act by functioning merely as a bargaining agency.

There is nothing in the language of the Act which indicates that there is limitation upon the forms of collective marketing which are proposed under the act. Is an association of fishermen, which engages in bargaining collectively for prices and terms and conditions under which its members shall market their fish a collective marketing agency? The term "collective marketing" is, of course, suggestive of collective bargaining. The purpose of collective marketing and collective bargaining is the same. It is to per-

mit individuals by combination to increase their economic strength and thereby to have some voice in determining the price for which either their product or their services are sold.

The House Report on the Fishermen's Marketing bill contains a quotation from the testimony of Mr. R. Bruce Etheridge of Department of Conservation and Development of North Carolina, who said: "I would not try to decide which one, but some form of marketing is the salvation of the fishing industry in my opinion." (1934 House Report No. 1504.) That what was involved here was some form of marketing is clear. It was a form of marketing achieved through collective agreement.

The debate on the Capper-Volstead Act, predecessor of the Fishermen's Marketing Act is also enlightening. During the course of that debate, Senator Calders said:

> "*They (farmers) are only asking that by affirmative action Congress recognize the principle of collective bargaining.*
>
> *Farmers have the natural and inherent right to approach their customers through agencies of their own creation.* This right should be clearly and positively recognized by Congress. If the Sherman and Clayton Acts had been generally interpreted as their authors intended they should be, there would be no necessity for the enactment of the bill which we are now considering. The right of farmers to collectively market their products would generally have been conceded." (1922 Senate Debate, page 2217.)

Throughout those debates there appears the recognition that the principle of collective bargaining and collective marketing are one and the same, and that it was the intent of Congress to permit farmers to collectively bargain for the sale of their product. Obviously the same intent was carried over to the Fishermen's Marketing Act.

During the course of the same debate, Senator Cummins pointed out that combinations of farmers may legally be formed for any one of three general purposes. They are: to lessen the cost of production, to lessen the cost of marketing, or third, to increase the market price of the commodity. (See Appendix J, p. 35, for Senator Cummins' statement.)

Thus, it is recognized that a combination specifically for the separate and distinct purpose of increasing prices is a proper form of association for farmers under the Capper-Volstead Act and is therefore a proper form for fishermen under the Fishermen's Marketing Act.

The fact that the form of collective marketing which has been found to be most appropriate for fishermen is the collective bargaining form of collective marketing was recognized by Judge McCulloch in the case of *U. S. v. Columbia River Fishermen's Protective Union, supra,* when he held "that the practice of group bargaining, which has been so satisfactory on the Columbia River to fishermen, as well as canners" was protected by the Fishermen's Marketing Act.

The Department of Commerce, which was charged with the enforcement of the Fishermen's Marketing Act,[1] has recognized these facts in a bulletin entitled "Organizing and Incorporating Fishery Cooperative Marketing Associations" Fisheries Circular No. 22, issued by the Bureau of Fisheries of that department. In that bulletin at page 7, there are listed a number of "functions which a fishery cooperative may perform." One of these is: "Elect officers or committees for the purpose of bargaining for the sale of fishery products of producers to manufacturers, processors, wholesalers, or retailers in the event that group or association does not contemplate operating a merchandising, processing, or packing business." Thus, the Department of Commerce recognizes that it is appropriate under the Fishermen's Marketing Act for an association to act as the bargaining agent of its members.

The argument that a collective bargaining association cannot qualify under the Fishermen's Marketing Act stands logic on its head. The Sherman Anti-Trust Law was never intended to apply to working producers. The Fishermen's Marketing Act not only reaffirms this original intent but permits vertical combinations of producers which extend into the field of business, which extension might in the absence of the Fishermen's Marketing law constitute a violation of the Sherman Anti-Trust Law.

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[1]The jurisdiction over this field has since been transferred to the Department of Interior.

Hulbert, at page 227 of his book, advanced the theory that defendants have consistently maintained when he says:

> "In view of the interpretation placed upon the antitrust statutes by the Supreme Court of the United States in several cases, it is arguable that the Capper-Volstead Act was not, strictly speaking, required for the purpose of giving authority to farmers to form associations, but that the organization of cooperative associations was permissible under the antitrust statutes."

Yet, here, the effect of the instructions of the Court was to inform the jury that unless the fishermen actually organized as a group of businessmen they were not entitled to the rights of working producers.

Under the Sherman Anti-Trust Act, the form of organization is not decisive. Whether or not there has been an unreasonable restraint upon trade is the question presented. *Appalachian Coals, Inc. v. U. S.*, 228 U. S. 344, 77 L. Ed. 825. So under the Fishermen's Marketing Act it isn't the form of organization or the precise manner in which it acts which is controlling, but rather the substance of what it does and its effect upon commerce. Thus, if the purpose of the Act is to permit fishermen to combine for the purpose of fixing prices then whether they use an association which bargains collectively for that purpose or which directly sells the product becomes immaterial. As the Court stated in the *Appalachian Coal* case (pp. 376, 377):

"*We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that in order to comply with the law those engaged in industry should be driven to unify their properties and businesses in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction.* If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a cooperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of

trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form, and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Board of Trade v. United States,* 246 U. S. 231, 238, 62 L. Ed. 683, 687, 38 S. Ct. 242, Ann. Cas. 1918D, 1207, supra; *United States v. Terminal R. Asso.,* 224 U. S. 383, 56 L. Ed. 810, 32 S. Ct. 507; *National Asso. of Window Glass Mfrs. v. United States,* 263 U. S. 403, 412, 68 L. Ed. 358, 361, 44 S. Ct. 148, supra; *Standard Oil Co. v. United States,* 283 U. S. 163, 169, 179, 75 L. Ed. 926, 945, 951, 51 S. Ct. 421."

Here, too, it is not necessary for fishermen to combine for the purpose of selling their products through a single agency if they can accomplish their objectives —legitimate objectives under the law—through the less drastic measure of forming an association which is a collective bargaining agency. The fact that in those instances where the less drastic measures are not sufficient, the law permits the more extreme method of the formation of more integrated types of combinations does not render illegal the looser form of organization.

In the case of *Johnson v. Georgia-Carolina Retail Milk Producers Association,* 182 Ga. 659, 186 S. E. 824, the defendant association was organized under the Agricultural Cooperative Marketing Act of the

State of Georgia. This association entered into individual contracts with its members whereby the association set a scale of minimum prices for the retail and wholesale marketing of milk in the Augusta markets and required each member of the associaton to market his milk in the Augusta markets for no less than the minimum price fixed by the association. The contract was held to be valid.

Cf. *Spark County Milk Producers Association v. Tabering,* 129 Ohio State 159, 194 N. E. 16, 98 A.L.R. 1593.

In "The Law of Cooperative Marketing" (1937) by Frank Evans and E. A. Stokdyk, former president of the Berkeley Bank for Co-operatives, Oakland, California, the existence of collective bargaining marketing associations in various fields is recognized:

> "The so-called 'bargaining' associations, that is, those which do not handle the products of members but merely bargain with distributors and processors, require few if any fixed assets. Examples of these are milk bargaining associations and sugar-beet growers' associations." (p. 163.)

In the hearings conducted by the Temporary National Economic Committee of the United States Senate on Investigation of Concentration of Economic Power, a statement was introduced by Dr. Hough, chief of the division of Marketing and Transportation Research of the Bureau of Agricultural Economics, recognizing that the purpose of col-

lective marketing is to equalize the bargaining power between producers and distributors:

> "We believe that cooperative marketing ought to become a more important factor in agricultural marketing than it has heretofore been and that it ought to be encouraged in certain new forms and new fields. If farmers are to be fully protected in dealing with large corporate processors and distributors, they will need cooperatives at the country end able to bargain with such distributors on an equal basis." (T.N.E.C. Reports, page 453, February 25, 1941.)

Defendant association was entitled under the Fishermen's Marketing Act to limit its activities to that form of collective marketing which consisted of bargaining for the prices and for the marketing conditions under which its members will directly sell their products to the dealers. The instructions contrary to this and the refusal to give instruction stating this principle it is submitted constitute prejudicial reversible error.

7. Summary.

The purpose of the Fishermen's Marketing Act was to extend to fishermen the provisions of the Capper-Volstead Act as applied to farmers. These Acts have as their objective the clear and unequivocal establishment of the right of fishermen and of farmers to form associations for the purposes of engaging in collective bargaining and, if they so choose, certain other activities, such as collective processing. It was the intent of Congress to remove any doubt

that fishermen and farmers had the right to organize for the purpose of equalizing their bargaining power with that of the distributors. The law was deliberately general in its terms, because it was intended to permit any form of association and of marketing which the farmers or fishermen thought would best effectuate these objectives. The Court erred in its instructions on these points.

B. THE COURT GAVE ERRONEOUS INSTRUCTIONS AND REFUSED TO GIVE CORRECT INSTRUCTIONS WITH RESPECT TO THE CLAYTON ACT, SECTION 6, 38 STAT. 731, 15 U.S.C, SECTION 17.

1. The statute.

> "Antitrust laws not applicable to labor organizations.
>
> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." § 6, 38 Stat. 731, 15 USC, § 17.

2. Error was committed by the Court in the instructions which it gave with relation to the Clayton Act.

See Appendix K, pages 36-38, for instructions given.

The defendants objected to these instructions on the ground that the instructions incorrectly stated that Section 6 of the Clayton Act is applicable only if defendants are employees of the fish dealers and, as such employees, are members of a labor union engaged in a labor dispute with the dealers; that a correct statement of the law turns not upon the existence of a labor dispute or upon the presence of a technical employer-employee relationship, but rather upon whether the defendants were engaged in selling their labor or the immediate products thereof, in which event the law does apply.

For defendants' objections as stated at the trial, see Appendix L, pages 39-41.

3. The Court erred in refusing to give instructions proposed by defendants.

See Appendix M, pages 42-48, for instructions refused.

4. The applicability of Section 6 of the Clayton Act under the evidence presented.

The facts showing that the defendants in this case are original working producers,—that is, working fishermen who sell their labor or the immediate products of their labor—have for the most part been adequately set forth in the statement of facts and in the portion of the argument above relating to the applicability of the Fishermen's Marketing Act. Certain additional matters merit consideration at this point.

Under the law of the State of California, a fisherman obtains either no property right or at best a very limited and peculiar type of property right in the fish which he catches.

People v. Stafford Packing Co., 193 Cal. 719;
People v. Huvden, 215 Cal. 54.

It has been held that the State retains its property interest in that fish even after the fish has been caught and has been sold to a processor. In the case of *People v. Monterey Fish Products Co.*, 195 Cal. 563, the trial Court held that an illegal use of fish by a processor in violation of the provisions of the Fish and Game Code did not cause damage to the State. In reversing the judgment of the trial Court, the Supreme Court of the State said:

> "Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose (citing cases). 'It is, therefore, evident that what the people of the state own they can alienate on such terms as they choose to impose, and that this power of regulation continues so long as such fish or game are the subject of trade or transfer.' "

The Court then cites certain sections of the Fish and Game Code, dealing with the manner in which fish may lawfully be taken from the sea. Then the Court goes on:

> "It follows that if the fish were taken in violation of law the fisherman who caught them acquired no title thereto, and even if they were

> taken lawfully the sale thereof to defendant for use in its reduction plant would convey no title thereto, and the title would still remain in the state. The use of fish which was admittedly made by the defendant herein was not merely a violation of prohibitory provisions of a statute, but was also a wrong committed against the property right of the plaintiff. It was such an obstruction to the free use of property as to interfere with the comfortable enjoyment thereof by the people of the state of California and as such constituted a nuisance. (Citing cases.) Under these circumstances it cannot be said that such use of fish by the defendant did not or will not cause any loss or damage to the plaintiff and this finding is, therefore, contrary to the evidence."

When a fisherman acquires a catch of fish, he obtains at best a qualified and very limited type of ownership in that fish. His harvest of fish never really becomes his property. He collects it subject to terms and conditions which the State imposes, and he can only deliver it upon those terms and conditions and to those persons to whom the State allows him to deliver. So limited is the control of the fisherman in his catch that the reality of the situation is that the fisherman is doing nothing more than rendering services in harvesting the fish and in delivering it to the dealers.

When a fisherman bargains for the price of fish he is directly determining the wage he will receive. He is setting, in effect, the piece-rate basis for work performed. It so happens that in this case the piece-

rate basis is determined by the price for which the fish is sold to the wholesaler and, therefore, the fisherman can set and determine his wages only by setting and determining the price. If that price goes up or down, his wages automatically go up or down. This is true both of the boatowner who furnishes the boat, the net and other instruments necessary to effectuate the catch, and the other working fishermen who have no investment in the necessary tools of the trade. If the working fisherman is deprived of the right to combine for the purpose of setting the price of the fish which he catches and delivers to the dealers, it necessarily follows that he is being deprived of the right to combine for the purpose of determining his wages, that is, for the purpose of determining the return for his expenditure of labor.

5. Section 6 of the Clayton Act relates to all human labor and to all working original producers including the defendants herein regardless of the existence of a technical employer-employee relationship.

The Norris-LaGuardia Act is applicable to labor disputes and labor disputes are defined therein as disputes either involving or affecting an employer-employee relationship. Therefore, in determining whether or not the Norris-LaGuardia Act applies to any given situation, the existence of an employer-employee relationship within the meaning of that Act may be of paramount importance.

The Clayton Act, on the other hand, provides that the labor of a human being is not a commodity or article of commerce, and nowhere is there any indi-

cation that this concept is limited to situations in which labor of a human being is expended in the course of an employer-employee relationship. The fact that the second sentence of Section 6 of the Clayton Act refers to agricultural or horticultural organizations in which obviously no employer-employee relationship exists is further evidence that Section 6 of the Clayton Act, as distinguished from the Norris-LaGuardia Act, deals with situations in which human labor is involved, regardless of whether or not there also exists a technical employer-employee relationship. This is confirmed by the legislative history with respect to the Clayton Act.

The Senate committee in reporting the Clayton Act to the floor said:

> "The only organizations which should be excluded from the operation of the anti-trust laws are those where *labor is the basis or one of the chief factors in the* organizations, as in the case of labor organizations proper, and in agricultural and horticultural organizations. The committee rests this distinction upon the broad ground that labor is not, and ought not to be regarded as a commodity, within the purview of anti-trust laws." (Emphasis supplied. Sen. Rep. No. 698, 63rd Cong., 2d Session (1914) 46.)

When the above is compared with the definitions contained in the Norris-LaGuardia Act it becomes obvious that the type of organization exempted by Section 6 of the Clayton Act is much broader than that to which the Norris-LaGuardia Act is intended to apply.

The first sentence of Section 6 of the Clayton Act exempting the labor of a human being from the definition of a commodity is known as the Cummins Amendment to the Clayton Act. The history of this amendment is thoroughly discussed in an article by Louis L. Boudin, 29 Virginia Law Review, 437. That article quotes copiously from the Congressional debates at the time that the Cummins amendment was introduced, and established that the author of the amendment was dealing with basic economic relationships and concepts, specifically with the distinction between those situations in which an individual is in business for a profit and those in which he is actually selling his labor or the immediate product thereof.

At page 428 of Boudin's article he states that the position of Senator Borah was also that "labor is not an article of commerce; and, in any event, workingmen do not trade in *other people's* labor like traders in commodities. They are *producers* and not *traders*. The anti-trust laws concededly deal with monopolies of trade, not of *production*."

What Congress had in mind was perhaps most forcefully expressed by Representative Quinn, who said at 51 Cong. Rec. 9546:

> "The only way on earth to keep the eagle eye of the Federal courts off the farmer's union and the labor unions is to make this anti-trust law so plain that they are not included in its scope that any child in the United States can understand it.
>
> If there is the slightest ambiguity in the language, you will hear of some federal judge in 'Possum Hollow' announcing a decision that the

> farmer's union is a trust in restraint of trade and that the individual members are subject to indictment if by concert of action they hold their cotton or other farm products for a higher price."

Finally, with respect to the legislative history of Section 6, the real distinction between a commodity and the labor of a human being was well stated by Congressman Buchanan, one of the leaders of the House, who said during the debate on the Clayton Act:

> "The fact of the matter is that under the perversion rather than the interpretation of the Sherman anti-trust law by the Federal courts, that which is held to be law is founded upon neither justice nor common sense. The Federal courts have fallen into that error which places voluntary organizations of working people, organized not for profit but for humanitarian purposes, in the same category with greedy trusts, corporations, and monopolies which control the product of labor and which speculate in the necessaries of the masses of the people. It is equal to placing human beings in the same scale with a ton of coal, a barrel of flour, or a bolt of cloth."

As has been set forth in the statement of facts, some of the defendants in this case have never owned an interest in a boat, and have simply worked on boats, receiving as their compensation a share of the price received for the catch. These men have no investment even in the simplest kind of tools. Can it be doubted that the share of the price which they receive is in its entirety a return for the expenditure

of their labor in the catching of the fish? Those defendants who at one time or another have owned an interest in a boat and its gear likewise received a share of the price for the catch in compensation for the labor expended by them in catching the fish, the same share, incidentally, as is received by the working fishermen who have no interest whatsoever in the boat. Does the fact that a man owns an interest in a boat, utilized for catching the fish, convert the compensation, which he receives for his labor, from a return paid for human labor to a profit paid upon an investment? With respect to both the boatowners and non-boatowners the question may well be asked, does the fact that the payment received for the fish is called "price" and instead of "wages" convert it from payment for expenditure of human labor to a return upon capital? Only by a most absurd construction of the law and of the facts can it be argued that the share received by the owners and by the non-owners for their work in catching the fish is not a return upon expenditure of human labor.

True, the boatowner receives an extra share in payment for the use of the boat and of the equipment furnished by him. The record shows, however, that the boat is not utilized as a means of investment for profit, but merely as the tools of the trade for fishing. It is not profitable, and the owner at best receives only the extra compensation for his labor in maintaining the boat, the rate of compensation in this connection often being less than the rate of compensation paid for the catching of fish.

The fact that the Fishermen's Marketing Act is merely an extension of the Capper-Volstead Act to fishermen has previously been noted. Both acts cover working producers who sell the products which are primarily the result of their labor, rather than constituting a return upon capital investment. That *non-stock* organizations of this kind are also exempted from the anti-trust act by Section 6 of the Clayton Act (provided that they do not combine vertically with middlemen) is established by the case of *United States v. Borden,* 308 U. S. 188, 84 L. Ed. 181, wherein the Court said:

> "Section 6 of the Clayton Act, enacted in 1914, had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the anti-trust laws should not be construed to forbid members of such organizations 'from lawfully carrying out the legitimate objects thereof.' They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922, was made applicable as well to cooperatives having capital stock."

The concept that services, such as those being rendered by the fishermen defendants in this case, are not within the purview of the Anti-Trust Law was conceived long before the adoption of the Clayton Act. Under the terms of the original act, it was held that services are not covered by that Act. *Hopkins v. U. S.,* 171 U. S. 578, 43 L. Ed. 290; *Anderson v. U. S.,* 171 U. S. 604, 43 L. Ed. 300.

In the Court below the prosecution relied heavily upon the case of *Columbia River Packers Assn. v. Hinton,* 315 U. S. 143, 86 L. Ed. 750, which case is discussed in considerable detail elsewhere in this brief. Judge McCulloch, the District Court Judge who was affirmed by the Supreme Court of the United States in his holding that the Norris-La Guardia Act did not apply to the facts of that case, later decided the case of *United States v. Dairy Co-Op. Assn.,* 49 Fed. Supp. 475, wherein he said:

> "An older generation of judges interpreted the Clayton Act, 38 Stat. 730, to defeat the plain intent of the law, and, almost perversely, it seemed, sought to impose their economic views on the American scene in the controversial field of capital and labor. The result was the enactment of the Norris-LaGuardia Act, 29 U.S.C.A. * * *
>
> Now I am asked to 'interpret' the other provisions of the Clayton Act which say generally that a farmers' cooperative association shall not be subject to the Anti-Trust laws. I am asked to hold that under certain circumstances, even when acting solely in its self-interest, and not in concert with others, a farmers' cooperative can be punished as a monopoly. I am asked to hold that in this case, which I am told is the first case brought by the Anti-Trust Division of the Department of Justice against a farmers' cooperative acting alone and not in concert with others, the defendant is attempting to create a monopoly and is punishable criminally. In short, I am asked to scuttle the plain language of the Clayton Act as to cooperatives, as anti-labor courts

scuttled the labor provisions of the same act, with the serious consequences that endure to this hour.

It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the Clayton Act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said that cooperatives were not to be punished, even though they became monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions, more ill-considered in fact, in view of the serious consequences to the American people, now known to have followed from those decisions in the labor field."

The defendant Local 36 is in the same economic category as a farmers' cooperative and the Clayton Act applies equally to it.

6. Moreover an employer-employee relationship within the meaning of the Norris-LaGuardia Act does exist between defendant fishermen and the fish dealers involved herein.

As stated above, the existence of an employer-employee relationship is not determinative of the application of the Clayton Act to the facts of this case. If it were, however, it is submitted that the evidence presented to the Court below requires the conclusion that such a relationship within the meaning of the Norris-LaGuardia Act does exist.

In the case of *Columbia River Packers Assn. v. Hinton,* 315 U. S. 143, 86 L. Ed. 750, supra, the Supreme Court did hold that no such relationship existed between fishermen and the fish buyers. How-

ever, an examination of the first opinion of the Circuit Court in that case (appearing at 117 Fed. (2d) 311, and setting forth the facts more fully than does the Supreme Court) shows that no such facts were presented to the Court as are in evidence here. In that case the record merely established that the fishermen were organized in a Union, and that they sold their fish to dealers. There was nothing in the record concerning the relationship between the fishermen and the dealers upon the basis of which the Court could look through the technical relationship to the real one existing between the parties. After the Supreme Court reversed the Circuit Court's ruling that the Norris-LaGuardia Act did apply, the Circuit Court reconsidered the matter in accordance with the mandate of the Supreme Court and said:

> "Appellants, by their combination, have acquired the power to fix the prices of fish and control the production thereof which deprives consumers of the advantages which accrue to them from free competition in the market." *Hinton v. Columbia River Packers Assn.,* 131 Fed. (2d) 88, 89.

In this case the defendants did offer evidence to establish that the fishermen are actually at a greater economic disadvantage with respect to the dealers than employees usually are with respect to their employer, and further, that fishermen have absolutely no power to affect consumer prices. The facts do appear in this record which were recognized by the National War Labor Board when during the war, it fixed prices to fishermen as constituting wages. In a typical panel report which was later approved by the

National War Labor Board, the panel said the following:

"* * * from an economic point of view both independent and company fishermen are really employees, since the price they receive for fish is substantially and in essence a wage. The payments or differentials paid or allowed with respect to boats and gear are in essence only rental payments. *Fishermen are not in business for a profit on their capital, a condition which is a characteristic of an independent entrepreneur.*

Panel Recommendations

In the opinion of the Panel, the fishermen—independent and company—in reality are laborers (not entrepreneurs) who furnish in a variable degree the tools of their trade. In most cases the fishermen begin to fish with equipment furnished by the Companies, and then in time many of them are able to buy their own boats and equipment. Fishermen like to own this equipment. They can fix it to suit their individual needs and keep it in a good state of repair. The price differential they receive also enables them to make wages in servicing the boat before and after the season. The capital earnings which they secure on their investment, however, is only a small fraction of their total earnings. Strictly speaking, the fishermen represent venture labor rather than venture capital.

Recommendation No. 1

In view of the fact that the fishermen are essentially a labor force, it is recommended that *for purposes of negotiations and bargaining rela-*

> *tionships,* any dispute as between fishermen (company and independent) and the industry shall be regarded as a labor dispute over which the War Labor Board should assume jurisdiction." *In the Matter of Alaska Salmon Industry, Inc.,* Case No. 111-7617-D, Before the 12th Region of the National War Labor Board, 27 WLR 760.

This same economic reality has been recognized by the Courts. Thus, in *U. S. v. Peterson,* 28 Fed. (2d) 29, 30, the Court said: here the fishermen's earnings "are to be treated as wages, whether the compensation was to be made in kind or money." Cf. *U. S. v. Laslin,* 24 Fed. (2d) 683.

In the case of *N.L.R.B. v. Hearst,* 322 U. S. 111, 88 L. Ed. 1170, it was held that under the Wagner Act, a man does not have to be on the regular payroll to be an employee. Because the anti-trust laws, and various amendments thereto, are, like the Wagner Act, based upon economic consideration, the following language from that case is particularly pertinent here (pp. 127, 128):

> "Interruption of commerce through strikes and unrest may stem as well from labor disputes, between some who, for other purposes, are technically 'independent contractors' and their employers as from disputes between person who, for those purposes, are 'employees' and their employers. Cf. Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U. S. 91, 85 L. Ed. 63, 61 S. Ct. 122. Inequality of bargaining power in controversies over wages, hours and working

conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as 'helpless in dealing with an employer,' as 'dependent * * * on his daily wage' and as 'unable to leave the employ and to resist arbitrary and unfair treatment' as the latter. For each 'union * * * (may be) essential to give * * * opportunity to deal on equality with their employer.' And for each, collective bargaining may be appropriate and effective for the 'friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.' 49 Stat. 449, c. 372, 29 USCA Sec. 151, 9 FCA title 29, Sec. 151. In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the end sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections."

Likewise in the case of *N.L.R.B. v. E. C. Atkins & Co.,* 91 L. Ed. Advance Opinions 1157, 1160-1, the Court was required to interpret the words "employee" and "employer" under the Wagner Act. With respect to these terms, the Court said:

"And so the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this

statute. This does not mean that it should disregard the technical and traditional concepts of 'employee' and 'employer'. But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. * * * Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees."

Cf. *National Labor Relations Board v. Blount,* 131 Fed. (2d) 585, certiorari denied 87 L. Ed. 1157, 318 U. S. 791.

Where the facts revealing the economic relationship between persons dealing with each other are not presented, the Courts can do nothing but look to the technical aspects of that relationship for the purpose of ascertaining its nature. That was precisely the situation the Court was in when the *Hinton* case was presented to it. Here, however, the facts indicating the true nature of that relationship have either been presented or offered. It follows that the basic and realistic tests laid down in the *Hearst* and *Atkins* cases must be applied here, rather than the technical one, which of necessity the Court was forced to apply in the *Hinton* case.

In *Rutherford Food Corp. v. McComb,* 91 L. Ed. Adv. Opinion 1350, the same nontechnical approach was followed in determining whether an employer-employee relationship existed within the meaning of the Fair Labor Standards Act. In that case the

Court took cognizance of the fact that the Fair Labor Standards Act, "concerns itself with the correction of economic evils" and that therefore it is necessary to consider the "underlying economic realities". The Clayton Act, like the anti-trust law itself, was designed to deal with "economic realities". In this case the record lifts the veil from the technical relationship and reveals the underlying reality that insofar as the purpose and intent of the Clayton Act are concerned, defendant fishermen stand in the economic position of employees in relation to the dealers.

In *Milk Wagon Drivers Union v. Lake Valley Farm Products,* 311 U. S. 91, 85 L. Ed. 63, certain dairies made sales of milk to individuals operating their own trucks who in turn resold the milk to retail stores. Other dairies hired truck drivers who performed the same function, and these truck drivers were members of American Federation of Labor unions. The defendant union tried to stem the spread of the vendor system, contending that it constituted unfair competition and depressed labor standards. In this connection, it picketed the stores serviced under the vendor system. The Supreme Court affirmed the holding of the District Court, that it lacked jurisdiction because of the Norris-LaGuardia Act and therefore could not grant an injunction. In discussing the Norris-LaGuardia Act, the Court said (p. 99):

> "To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned aban-

> donment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife."

In regard to the existence of a labor dispute, the Court discussed and applied the definitions contained in 13(a), (b) and (c) of the Act, saying (p. 93):

> "The Norris-LaGuardia Act applies to labor disputes between 'persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests herein.' Here, *all* of the parties have 'direct or indirect interests' in the production, processing, sale, and distribution of milk."

In the present case all of the dealers and all of the fishermen were interested in the production of fish. At least those fishermen who had no interest in any boat were employees whose wages were determined on a piece-rate basis by the price that was paid for fish. The only way they could increase their wages was to increase that piece rate. This could not be done without at the same time raising the piece rate for the boat owners who, defendants contend, are also employees. But whether or not the boat owners are employees, the non-boat owners are in that category and therefore the dispute in this case concerned a price or piece-rate contract, and was a labor dispute within the meaning of the Norris-LaGuardia Act.

Summary.

The trial Court erroneously instructed the jury that in order for the Clayton Act to apply, an employer-employee relationship between the fishermen and the dealers was a prerequisite, and that the fishermen and the dealers had to be engaged in an employer-employee labor dispute; the trial Court erroneously refused instructions to the effect that the Clayton Act did apply if the sale of the fish by the fishermen to the dealers was basically a rendition of services or a transaction involving fundamentally the expenditure of human labor.

Furthermore, the Court erred in refusing to instruct the jury that for the purposes of this case an employer-employee relationship might exist if there was basically a sale of labor plus a lack of equal bargaining power, even though for other purposes the fishermen technically might be independent contractors. These errors went to the heart of the issues presented to the jury and were therefore, of course, extremely prejudicial.

C. THE COURT GAVE ERRONEOUS INSTRUCTIONS AND REFUSED TO GIVE CORRECT INSTRUCTIONS WITH RESPECT TO THE APPLICATION OF THE ANTI-TRUST LAWS TO FISHERMEN WHO WERE ORIGINAL WORKING PRODUCERS.

See Appendix N, pages 49-52, for defendants' requested instructions which were refused.

Appellants contend that, even apart from the immunities extended by the Fishermen's Cooperative Marketing Act, the collective action of fishermen is

not in restraint of trade. Many of the arguments given below are summaries of economic studies and of discussions contained in decisions, citations of which are likewise given.

Fishermen are "original producers"; this is to say that a product comes to being in their hands for the first time, as a result of their labor. Like farmers, their produce has no previous owner and it reaches the fisherman by *labor,* not by purchase. Original producers are unlike manufacturers in that in the case of manufacturers the product is fashioned and assembled from other products; and although labor is an ingredient in the manufacturing process it is usually not the principal ingredient, and it is usually the hired labor of others. In the case of farmers and fishermen, the principal ingredient is labor, the labor of the man who disposes of the product, not the labor of his employee.

The dealer's "net" is profit on a sale. He has laid out money and has taken back a larger sum. His venture is dollars. The manufacturer is much in the same situation. He has risked money for plant, materials and wages. His "net" is the overplus of return over his ventured capital. The fishermen, farmers, and other original producers (other than the corporate producer, the factory farmer, which is essentially a manufacturer) lays out a minimum of money for tools. His expenditure is labor. His return is not an overplus; it is not a "margin". His return is essentially a wage, compensation for his labor.

The farmer invests in his land, in equipment, and perhaps in wages for auxiliary farm labor at harvest; but he does not invest in the products of the land. Similarly, the fisherman may invest in a boat and gear, but he does not invest in the fish he has caught. (In this respect the fisherman is worse off than the farmer; under California law he does not even own the fish, and cannot enjoy the doubtful privilege of destroying it either to create a scarcity or to prevent an oversupply; he does not share the dairyman's anti-social "right" of pouring milk on the highway.)

Original producers have been recognized to occupy a privileged position in the national economy. The essential stuff for the life of a nation's peace comes to being through their labor. The ordinary tests for the survival of a business are not permitted to apply in the case of original producers. That the production of milk or wheat would entail a financial loss would not necessarily lead to its cessation, as it would in the case of almost any other business. Government subsidies and special legislation of all kinds evidence the peculiar position of original producers in the economic structure of the nation.

Original producers are often persons of small means, and are usually scattered over a large area. This is necessary because of the character of their work; since they derive their products by contact with the land and the sea, the man-land ratio is much greater in the case of original producers than it is, to take another extreme, in the case of textile manufacturers.

Original producers are usually not equipped to undertake marketing to the consumer. Distribution and marketing are operations which are not economically feasible on the small scale available to the original producer, the quantity of whose products is limited by the productive capacity of his own hands. For this reason original producers usually dispose of their products to a dealer, whose economic strength is far greater than that of the producer.

The dealer occupies a middle position. In his transactions with the original producer his position is superior because he has the power to refrain from buying, whereas the original producer, because of the perishable character of his product, does not have the economic power to refrain from selling. On the other hand in his relationship to the consuming public the dealer's position is likewise strong. Dealers are relatively few, the consuming public is large. Organization, formal or informal, is simple and common among the dealers, and relatively impossible among the consuming public. In any event, the consuming public has to buy; whereas the dealer usually has the facilities to store if he is not satisfied with the current price.

The result of the relative position of the original producer, the dealer, and the consuming public is that the price to the producer has practically no effect whatever on the price the consumer pays. The margin between the dealer's purchase price and costs is largely within his control. He can dictate the former

to a large extent. This is particularly true in the case of the fishermen because in the absence of a collective agreement the transaction has the characteristic of a forced sale. The dealer's price to the consumer is usually determined not by competition among dealers but by competition between different commodities. Thus the retail price of fish has no relationship to the price the dealer pays to the fisherman, but is determined by the quantity of product available and the retail price of meat, cheese and eggs.

Collective action among producers does not raise the price to the consumer. It permits the producer to get a fair return; the work is thus made more attractive, and more farmers or fishermen go into production. The supply is thus increased; and more often than not the price to the consumer is lowered as a result.

Collective action among producers protects the group against a combination among buyers to depress the price paid to producers.

> "The farmer may suffer because monopolistic elements on the selling side make for higher food prices (due to branding, resale price maintenance, local partial-monopoly in retailing, customary 'mark-ups', or for whatever reason) which may be passed back to him in the form of a restriction of aggregate demand for the farm product which he sells, hence a lower price for his product. Only if farmers are strongly organized, either cooperatively or through government control, so that part of any monopolistic gains may

accrue to themselves, may it be in the farmer's interest that prices to consumers are higher than the purely competitive level. Even where farmers are so organized, each is interested primarily in total net income, which depends not only upon price, but also upon the quantity he is allowed to sell by the central authority and his costs of production." (Nicholls, *Imperfect Competition Within Agricultural Industries* (1941), Iowa State College Press, page 155).

Owen Co. Burley Tobacco Soc. v. Brumbach, 128 Ky. 137, 107 S. W. 710;

Tobacco Growers Coop. v. Jones, 185 N. C. 265, 117 S. E. 174, 33 A.L.R. 231.

See also:

Investigation of Concentration of Economic Power, TNEC Report, pp. 384 to 406; 453; 2821 et seq., 2873;

Problems of Monopoly and Economic Warfare, F. Zeuthen (London, 1930);

Monopoly Supply and Monopoly Demand, A. J. Nicholls, University of Chicago Press.

Collective action among producers rationalizes marketing methods by preventing wasteful flooding of the market and stimulating flows of supplies when there is a consumer demand.

Warren v. Alabama Farm Bureau, 213 Ala. 61, 104 So. 264;

Washington Cranberry Growers Ass'n. v. Moore, 117 Wash. 430, 201 P. 773, 25 A.L.R. 1077.

It tends to eliminate the wasteful spread between the producers return and the consumer price.

Minnesota Wheat Growers v. Higgins, 203 N. W. 420;

Dark Tobacco Growers Ass'n. v. Dunn, 150 Tenn. 614, 266 S. W. 308.

All of this was recognized in the common law. Inhibitions against restraints at common law were directed solely against traders and middlemen. (See *"The Masquerade of Monopoly",* Frank Herbert Feller, Harper, Brace & Company (1931).

The common law of restraints was imported into the Sherman Act. Not only is this the holding of the *Apex* case, but it is apparent from an examination of the legislative history of the act itself. The bill when it was originally introduced was aimed *directly* at the raising of prices through combinations and conspiracies to prevent full and free competition. (See discussion of this in Chapter 2 of "Labor and the Sherman Act," by Professor Edward Berman-Harper's, 1930.) It was immediately criticized that a bill in such form would outlaw both the Farmers' Alliance and the Knights of Labor. Senator Sherman himself offered a proviso exempting labor and farmers' organizations and it was adopted in the committee of the whole without the formality of a roll call. (Berman, p. 21.)

Then the bill was re-referred to the judicial committee for redrafting. When it emerged from that committee a few days later, the Sherman Act was

no longer directly aimed at combinations to raise prices. The committee draftsman escaped the difficult constitutional job of discriminating between "good" and "bad" combinations to raise prices by simply dropping the whole original idea. Instead, as Justice Stone said in the *Apex* case, 310 U. S. 469, at 498, 84 L. Ed. 1311, 1325-26:

> "* * * the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law *they took over that concept* by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints." (Emphasis added.)

Under the revamped bill, it was apparent that only common law restraints of trade were to be punished. Since it was well known that this field of the common law only concerned the activities of traders and the market place, there was no longer any necessity for the proviso as to agricultural and labor organizations. The proviso was dropped out not because the Senate had changed its mind about exempting labor and agriculturists but rather because their new bill could

not be applicable to the pursuits of original producers.

It is well known that in 1890 the Congress was in a hurry to pass a bill which would prohibit trusts. As Senator Platt said, "It has been in the line of getting some bill with that title that we might go to the country with." (Berman, p. 27.) Consequently, instead of taking the pains of careful draftsmanship, the Congress merely took the readymade common law of restraints of trade and made a Federal statute out of it. Congress was not completely satisfied with this *indirect* attack on combinations to raise prices; bills like the Sherman Act in its original form with the same *direct* provisions as to price-raising combinations and the exemption of farmer and labor organizations were introduced by one senator and four representatives in 1892, and by another representative in 1898. (Berman, p. 12.) But none of these bills was ever passed.

Thus it is clear that in the mind of Congress in 1890, only a statute aimed *directly* at combinations to fix prices would affect combinations of laborers or farmers to raise their wages or prices for their products.

It is also clear that no such consideration for agriculture or labor was felt necessary when the common law of restraints of trade was being adopted into the Federal statute. These laws had only affected traders in the past and had never been applied to original producers such as laborers or agriculturists.

When earlier in this century agricultural cooperatives were organized in most states of the Union, they were attacked in the Courts on many grounds, two of which are important to the discussion here. First, it was argued that they were in restraint of trade and thus violated the Sherman Act, similar state statutes, and provisions in state constitutions against restraint of trade and monopoly. Second, in those instances where there were statutory exemptions for agricultural cooperatives, the exemptions were attacked as violating the Fourteenth Amendment on the ground that there was no reason to classify them separately from business, trade and manufacture.

Those controversies are now history. That agricultural cooperatives had an extremely difficult time in the Courts is evidenced by the passage of the Capper-Volstead Act. It is apparent that the language of the Clayton Act, naming agricultural and horticultural cooperatives was found insufficient; and specific congressional legislation in favor of agricultural cooperatives proved necessary. But the victory of agricultural cooperatives in the Courts, even prior to the passage of the Capper-Volstead Act, is relevant to the present appeal because it shows that collective action by original producers is not in restraint of trade; and victories subsequent to the Capper-Volstead Act and subsequent to the passage of specific legislation indicates that the exemption in favor of agricultural cooperatives was justified by the essential differences between original producers and other forms of enterprise.

Because the working fisherman is an original producer and is not in any relevant essential different from the farmer, quotations from landmark decisions dealing with agricultural cooperatives are set forth at Appendix "O", pages 53-61.

In the case at bar we think it will be conceded that the fisherman is economically indistinguishable from the farmer. All of the factors which removed the activity of farmers from the orbit of common law restraint of trade are present in the case of fishermen: the fact that the fisherman is an original producer, that his return is substantially compensation for labor, that he is of small financial means, that he is unable to deal on an equality with the fish dealers, that the fluctuations in prices paid to fish dealers are independent of the level of the retail price paid by the consumer, and that collective action is absolutely essential in order to permit the industry to survive. We submit that the activity of Local 36 is not forbidden by the Sherman Act.

D. THE COURT ERRED IN ITS INSTRUCTIONS WITH RELATION TO THE RULE OF REASON.

1. Error was committed by the Court in the instructions which it gave with relation to the rule of reason.

The Court instructed the jury as follows:

> "If you find that the fishermen members of defendant association are in fact business men as charged in the indictment and that the defendants have in fact combined and conspired among them-

selves to fix the price at which the individual members sell their fish to the dealers, then it is immaterial whether the price so fixed by agreement among the defendants is reasonable or unreasonable.

Price-fixing includes more than the mere establishment of uniform prices. Prices are fixed within the meaning of these instructions if the prices to be charged by the individual fishermen members of defendant Local 36 are to be at a certain level; or on ascending or descending scales, or if they are to be uniform, or if by various formulae they are to be stabilized. Price-fixing also includes placing a floor under the market, a floor which may serve the function of increasing the stability and firmness of market prices, and which may prevent the determination of those prices by free competition alone. * * *

You are instructed that the elimination of so-called 'competitive evils' in an industry is not a legal justification for price-fixing contracts otherwise illegal. Ruinous competition, financial disaster, and evils of price-cutting are not available to justify the action or conduct of persons engaged in an unlawful combination to fix and determine in an arbitrary manner prices of commodities sold in an interstate market. Genuine or fancied competitive abuses are no legal justification for illegal price-fixing combinations or conspiracies, and the good intentions of the members of any such illegal combination are likewise immaterial." (Tr. 1940, 1946.)

The defendants objected on the grounds that the rule of reason does apply to price fixing agreements

under the facts of this case. (See Appendix P, pp. 62-63, for statement of defendants' objections.)

2. The Court erred in refusing to give instructions proposed by defendants.

See Appendix Q, pages 64-68, for defendants' proposed instructions which were refused by the Court.

The proposed instructions which were refused set forth three principal matters. First, that the rule of reason is applicable in this case; second, specification of some tests to be utilized in applying the rule of reason; and third, that the Sherman Anti-Trust Law is intended to apply only where the restraint has a tendency to affect consumer prices.

Because the District Court instructed the jury that the rule of reason did not apply at all, the appellants will limit themselves to a consideration of the question relating to the applicability of the rule of reason to the facts of this case.

3. The rule of reason is applicable to working original producers who combine for the purpose of obtaining uniform stabilized price agreements between themselves and wholesalers or other middlemen.

The trial Court held that the purpose of the combination which is the subject of the indictment herein was to fix prices between the fishermen and the dealers and that any combination for the purpose of fixing prices is illegal *per se*.

In reaching its conclusion, the trial Court overlooked a number of basic considerations. The fact that the cases laying down the rule that price fixing

agreements are illegal *per se* involve combinations and aggregations of industrial capital was completely ignored. Of course, the Supreme Court has held consistently that such combinations because of the potential power which they have to harm the public are illegal *per se*. To conclude therefrom that the same rule must automatically be applied to working original producers in their relations with middlemen is to take a step which neither reason nor precedent supports.

The underlying distinction between the combinations of industrial capital and combinations of agricultural or other producers has perhaps been stated best in the authorities upholding the constitutionality of agricultural marketing or cooperative acts which wholly or partially exempt combinations of agricultural workers from the provisions of anti-trust laws. In the case of *List v. Burley Tobacco Growers Co-op. Assn.*, 114 Ohio State 361, 151 N.E. 471, it was contended that such a law was unconstitutional because it constituted an unreasonable and arbitrary classification and an unlawful discrimination against industrial combinations. In holding the classification a valid one, the Court said:

> "In determining whether co-operative associations organized for the purpose of marketing agricultural products are such a favored class as to be within the inhibitions of the fourteenth amendment, we must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in

> any commercial enterprise, and we should further look to the fact that many of them are very small producers of such limited means that they must market their products immediately after harvesting and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities."

The most interesting feature of this case is that in it a combination of tobacco growers aggregating not less than three-fourths of all of the aggregate production of burley tobacco in Kentucky, Indiana, Tennessee and Ohio entered into a single marketing agreement. The validity of this agreement was sustained not only under the cooperative marketing law of the state of Ohio, but also under the rule of reason. The Court so held despite the fact that the Ohio antitrust law "is in much broader and stronger terms than the federal enactment." Nevertheless, upon the basis of findings of fact to the same general effect as those noted by the Court in upholding the cooperative statute as a valid classification of agricultural associations, the Court held that the rule of reason applied to the combination, and that there was not an unreasonable restraint of trade. In this connection, the Court said:

> "On the other hand, it is recognized that competition may be reasonable or unreasonable. It may promote sound and sane relations between supply and demand, or it may ruinously place

> producers at the mercy of consumers and middlemen."

The Appellate Court agreed with the finding of the trial Court that the testimony did not show that the methods used by the cooperative were calculated "to increase the cost of the finished product to the consumer." The Court then stated:

> "The government reports clearly indicate that this cooperative effort is stimulating increased production, and the reason is not far to seek. The mere fact of stabilizing marketing conditions has inevitably caused a steadier market and an increased production. * * * It is apparent that the pool is not able to control prices. The census shows that there are more than 6,000,000 farmers in the United States, and it is manifestly impossible to 'corner' any branch of agricultural production."

Finally the decision pointed out that "the number of manufacturers of burley tobacco is quite limited and the number of growers is quite large." Thus, this case is authority for the proposition that the very reasons which justify the special classification of original producers exempting them from the provisions of the anti-trust laws require the application of the rule of reason to contracts which, if they had been entered into by industrial aggregations of capital, would have constituted *per se* violations of the anti-trust laws.

The case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, held that the exemption of agricultural associations from the anti-trust laws

constituted an arbitrary classification. The case of *Liberty Warehouse Co. v. Burley Tobacco Growers Co-Operative Marketing Assn.*, 276 U. S. 71, 72 L. Ed. 473, while not expressly overruling the *Connolly* case, undermined the concept upon which the *Connolly* case is based and pointed the way to its early demise. In the *Liberty Warehouse* case the Court pointed out that cooperative marketing statutes substantially like the one under consideration in that case had been enacted by 42 states, saying (p. 94):

> "These statutes reveal widespread legislation approval of the plan for protecting scattered producers and advancing the public interest."

The Court then noted that except for the Supreme Court of Minnesota, not a single Court has condemned any essential feature of these statutes. The opinion then goes on (pp. 93, 94):

> "In the court below it was said:
>
> 'We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handler between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is

also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.' (208 Ky. 649, 271 S. W. 695.) * * *

In Manchester Dairy System v. Hayward (1926) 82 N. H. 193, 132 Atl. 12, the supreme court of New Hampshire said:

'Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products. * * *' "

Most important is the fact that this decision equates the protection of "scattered producers" with the advancement of "the public interest". It recognizes that the "common interest" is advanced by allowing combinations of agricultural producers precisely because such combinations result in increased prices to the producers.

In holding the rule of reason inapplicable in the present case, the Court below relied primarily upon the case of *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 84 L. Ed. 1129. On the very day that the Supreme Court decided the *Socony-Vacuum* case,

it also handed down a decision in the case of *Tigner v. Texas,* 310 U. S. 141, 84 L. Ed. 1124, which latter case put to rest the case of *Connolly v. Union Sewer Pipe Co.,* supra, once and for all. In the *Tigner* case, the Court said:

> "Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who, as producers, as well as consumers, constituted the most dispersed economic groups. These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. * * *
>
> At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process."

To recognize on the one hand that, because of the difference in functions and forces in our agricultural economy as distinguished from the balance of the economic process, there is a conception "of price

and production policy for agriculture" very different from that which underlies the demands made upon industry and commerce by anti-trust laws, and on the other hand to urge that the rule that all price-fixing agreements are *per se* illegal simply because they have been so held with respect to industrial combinations, is anything but consistent.

The similarity between working fishermen and agricultural producers has been noted elsewhere in this brief and need not be given detailed consideration here. Suffice it to point out at this time, that the fishermen, too, are confronted with the problem of a small number of buyers on the one hand and a large number of sellers on the other, with necessity of immediately disposing of a perishable product, and with a history which indicates that higher prices to the working producer means increased production and in the long run lower prices to the consumer. The rule that price-fixing agreements are *per se* illegal when applied to industrial combinations arises from the fact that in every respect the tendencies and potentialities of such contracts are exactly the opposite from those which exist with respect to combinations of working producers. The Court below followed precedent by applying the same precedent to exactly opposite situations.

Furthermore, the Sherman anti-trust law cannot be considered here without reference to the Clayton Act and to the Fishermen's Marketing Act.

> *United States v. Hutcheson,* 312 U. S. 219, 85 L. Ed. 789.

(See Appendix R, pp. 69-70, for discussion by Court.)

Because of the historical and legislative relationship between the Sherman Anti-Trust Act, the Clayton Act and the Fishermen's Marketing Act, they must be read together as part of a single "harmonizing text". Having done this, it is not enough to follow the bare words of the integrated text, but what must be sought and applied is the policy underlying it.

How does this all affect the application of the rule of reason? As Mr. Justice Holmes stated in the case of *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, 83 L. Ed. 784, 789, cited in the *Hutcheson* case, supra, "a statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind." Regardless of what the policy may have been prior to the enactment of the Clayton and the Fishermen's Marketing Acts, the policy established therein is to permit combinations of working producers, such as the fishermen involved in this case, for the precise purpose of obtaining greater returns for their product and their labor. Such a policy cannot be reconciled with the concept that price-fixing agreements obtained by combinations of working fishermen are *per se* illegal. To the contrary, the express policies of Congress would seem to require the conclusion that such price-fixing agreements are legal and do not constitute violations of the Sherman Anti-Trust Law, except

perhaps where they are clearly unreasonable and arbitrary.

4. The rule that price-fixing agreements are illegal per se applies only where such agreements are imposed by a combination having the potential power to fix prices to the consumer.

Many cases recognize that the basic objective of anti-trust laws is to protect the consumer. Thus, in the case of *List v. Burley Tobacco Growers Co-Op. Assn.,* 114 Ohio State 361, 151 N. E. 471, 476-7, the Supreme Court of Ohio held that a combination entering into price agreements which did not have the actual or potential power to increase the cost of the finished product to the consumer could, without violating the state anti-trust law, enter into price-fixing agreements which would then be tested by the rule of reason. In the case of *Board of Trade v. United States,* 246 U. S. 231, 240, 62 L. Ed. 683, 688, Mr. Justice Brandeis, in holding legal the Board of Trade rule which fixed prices for certain hours of the day, said with respect to that rule:

> "In that way the rule made it possible for them to pay more to farmers without raising the price to consumers."

Thus, the Supreme Court recognized that a rule which resulted in higher prices to farmers, was in accord with the intent of the Anti-Trust Law, by reason of the fact that it resulted in increased prices to the farmer.

In *Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, 89 L. Ed. 1939, the Court in referring to *Apex Hosiery Co. v. Leader,* 310 U. S. 469, said:

> "The opinion in that case, however, went on to explain that the Sherman Act 'was enacted in the era of "trusts" and "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern;' that *its purpose was to protect consumers from monopoly prices,* and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade." (Emphasis ours.)

Perhaps the most important case on this point is that *Appalachian Coals v. United States,* 288 U. S. 344, 77 L. Ed. 825.[1] It should be noted first of all that this case has never been overruled and is in effect cited with approval, although distinguished, in the very cases which lay down the rule that price-fixing agreements are illegal *per se.* And the *Appalachian Coals* case is perfectly consistent with the *"per se"* cases because in the former, the Court found that consumer prices were not fixed whereas in the latter the Court found that consumer prices were controlled by the illegal combination. Although the *Appalachian Coals* case sometimes refers to market prices and sometimes to consumer prices, it is obvious that these terms are used by the case and by other cases practically interchangeably. Thus, the Court said:

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[1]Because of the numerous times that this case will be referred to below, it will hereafter be referred to merely as the "*Appalachian Coals* case".

> "The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendants' plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to *market prices* and other matters affecting the public interest in interstate commerce in bituminous coal." (Emphasis ours.) 288 U. S. 361, 77 L. Ed. 830.

At a later point in the decision, the Court goes on to say:

> "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry, then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.
>
> The question thus presented chiefly concerns *the effect upon prices.* The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will

> be able to fix *the price of coal in the consuming markets.*" (Emphasis ours.) 288 U. S. 372-3, 77 L. Ed. 836.

A few sentences later, the Court again says:

> "The plan cannot be said either to contemplate or to involve the fixing of *market prices.*" (Emphasis ours.) 288 U. S. 372-3, 77 L. Ed. 836.

It thus appears that when the Court speaks about market prices or about prices, it is actually referring to "the price of coal in the consuming market."

The fact that the combination actually engaged in price-fixing is beyond question. Thus, all of the members of the combination were required to deliver their products to it and the association then sold the coal of its principals. As the Supreme Court said:

> "The plan contemplates that prices are to be fixed by the officers of the Company at its central office * * *." 288 U. S. 358, 77 L. Ed. 828.

Even further, prices were fixed in precisely the manner that the defendants in this case sought to fix prices. Thus the Court pointed out:

> "In order to preserve their existing sales' outlets, the producers may designate sub-agents, according to an agreed form of contract, who are to sell upon the terms and prices established by the Company and are to be allowed by the Company commissions of eight per cent." 288 U. S. 358, 77 L. Ed. 828.

Thus, in the cited as well as in the instant case, the association alleged to have violated the anti-trust

laws fixed the prices at which its members would directly sell their products.

It is simply ridiculous to assert that there was no price-fixing in the *Appalachian Coals* case. What was lacking there and what was present in the case holding that price-fixing is *pre se* illegal was the actual fixing of prices or the potential power to fix prices in the consumer market. In the *Appalachian Coals* case, the price was fixed for the consumer by reason of other competitive factors, and the producers involved there were simply incapable of fixing the price to the consumer.

As a matter of fact the *Appalachian Coals* case goes so far as to hold that if the price to the consumer is merely affected but is not fixed by the combination, there is no violation of the anti-trust laws.

> "The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. * * * Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices." 288 U.S. 374, 77 L.Ed. 837.

The instructions proposed by the defendants herein and rejected by the Court did not go so far as the

Supreme Court did in the *Appalachian Coals* case. The proposed and rejected instructions were to the effect that a price-fixing agreement did not violate the law unless it tended to affect consumer prices. See Instruction S-17, supra; Tr. 63-4.

It is not true, as the Court below seems to believe, that the rule that price-fixing agreements are *per se* illegal was first established after the decision in the *Appalachian Coals* case. As a matter of fact, that rule was laid down in the case of *United States v. Trenton Potteries Co.*, 273 U.S. 392, 71 L.Ed. 700, and the existence of that rule was specifically recognized in the *Appalachian Coals* case:

> "In United States v. Trenton Potteries Co., 273 U.S. 392, 71 L.ed. 700, 47 S. Ct. 377, 50 A.L.R. 989, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that *the power to fix prices involved 'power to control the market and to fix arbitrary and unreasonable prices,' and that in such a case the difference between legal and illegal conduct could not 'depend upon so uncertain a test' as whether the prices actually fixed were reasonable,* a determination which could 'be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.' " (Emphasis ours.) 288 U.S. 375, 77 L.Ed. 837.

In the *Trenton Potteries* case and in all of the other cases where the *per se* rule has been adopted there existed the power to fix arbitrary and unreasonable prices to consumers. Where that is the case a price-fixing agreement is illegal regardless of whether the prices fixed are actually arbitrary and unreasonable. Where, however, that power does not exist as it did not in the *Appalachian Coals* case and as it does not in the present case, the rule of reason is applicable to the price-fixing agreement.

In the instant case the evidence shows not only that it was impossible for the defendants to fix prices at the consumer level, but that it was actually impossible for them to arbitrarily fix the prices at which they sold to the dealers. It was pointed out in the *Appalachian Coals* case that competition with coal from other areas prevented the Association in that case from arbitrarily fixing the price. In the instant case, likewise, particularly because the volume of fish coming in from outside the area is much greater than the volume of fish caught in the Southern California region, the dealer does not have to pay any arbitrary price in order to continue to do business. If he enters into an agreement to pay prices higher than that for competing fish from other areas, he can simply not buy fish under that agreement and obtain his supplies from outside the Southern California region. The fact is that fishermen do not have the power to fix an arbitrary price at any level, and have no power whatsoever to affect the price to the consumer.

Every sales agreement fixes prices for a transaction or series of transactions. Only where a group is in a position to determine or fix the general market price is an agreement fixing a contract price an unreasonable restraint of trade. In this case the power to enter into a price-fixing contract means only the power to establish an agreed-upon price, which of necessity must be a competitive price and which cannot possibly affect the consumer market. Even more, such an agreement does not tend to increase the prices charged by dealers to other middlemen. (See Appendix S, pp. 71-72, for factual data supporting this statement.)

That price fixing is not *per se* illegal in all cases is further evidenced by the case of *Standard Oil v. United States,* 75 L.Ed. 926, 283 U.S. 163, wherein a combination of oil companies fixed the rate of royalties on a number of patents which they owned and which they pooled by fixing the rate of royalties on the patents. In considering whether or not this combination and fixing of royalties constituted a violation of the anti-trust laws, the Court raised the question whether the combination had the power to fix prices. Obviously the Court was referring to prices to the consumer because at the industrial level, the very thing in issue was the fixing of prices for the use of the patents in question. Thus the Court said:

> "The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is *tantamount to the power to fix prices.* * * * But an agreement for cross licensing and division of

> royalties violates the act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce." (Emphasis ours.) 283 U.S. 174-5, 75 L.Ed. 948.

Whereupon the Court proceeded to determine whether the fixing of royalty prices by the use of the patent actually tended to fix prices in the market or otherwise restrain trade. The question was answered in the negative because of factors which are directly pertinent here. Thus the Court noted that the pooling and price fixing arrangements actually resulted in "commercial expansion of competing processes". Here, too, lack of agreements results in commercial stagnation, existence of agreements leads to commercial expansion.

The Court then noted that the output of cracked gasoline was about 26% of the total gasoline production. The Court then said:

> "Under these circumstances the primary defendants could not effectively control the supply or fix the price of cracked gasoline by virtue of their alleged monopoly of the cracking processes, unless they could control, through some means, the remainder of the total gasoline production from all sources." 283 U.S. 176, 75 L.Ed. 949.

Similar lack of control on the part of the fishermen has heretofore been noted.

The Court then went on to point out that "defendants and their licensees neither individually nor col-

lectively controlled the market price or supply of any gasoline moving in interstate commerce''. So here, as has been shown, there is no relationship between the price charged by the fishermen and the consumer price or price which the dealers charge at the time that they ship the fish in interstate commerce. Therefore, the fishermen do not control the market price or supply of fish moving in interstate commerce. The conclusion which the Court then drew with respect to the lack of control of the gasoline market is particularly apt here:

> "In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition." 283 U. S. 179, 75 L. Ed. 951.

Finally, with respect to the rulings of the District Court, the Supreme Court said:

> "The district court accepted the government's estimates of cracked gasoline production; found that the primary defendants were able to control both supply and price by virtue of their control of the cracking patents; held that although these patents were valid consideration for the cross licenses, the agreement to maintain royalties was in effect a method for fixing the price of cracked gasoline; and concluded that a monopoly existed as a result of such agreements. This appears to be the only basis for the relief granted. But the widely varying estimates, relied upon to establish

> dominant control of the production of cracked gasoline were insufficient for that purpose. And the court entirely disregarded not only the fact that the manufacture of the cracked is only a part of the total gasoline production, but also the evidence showing active competition among the defendants themselves and with others. Its findings are without adequate support in the evidence. The bill should have been dismissed." 283 U. S. 182-3, 75 L. Ed. 952-3.

In the present case the trial judge by his instructions did not merely incorrectly evaluate the testimony, but refused altogether to let the jury consider the very matter which the Supreme Court held to be determinative in the *Standard Oil* case.

The government's theory represents a complete misconception of the purposes of the anti-trust laws, insofar as they affect the relationship between those engaged in business transactions. The case of *Dr. Miles Co.,* which is John D. Parks & Sons Co., 55 L. Ed. 502, 220 U. S. 373, points out the distinction between the objectives of the anti-trust laws as they affect consumers and the public, and these objectives insofar as they affect individuals or groups of individuals engaged in transactions between themselves. The Court said:

> "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. *But the public interest is still the first consideration.*" (Emphasis ours.) 220 U. S. 406, 55 L. Ed. 518.

The Court then goes on to quote the case of *Gibbs v. Consolidated Gas Co.,* 130 U. S. 409, 32 L. Ed. 984, as follows:

> "Public welfare is first considered, and if it be not involved, and *the restraint upon one party is not greater than protection to the other party requires,* the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable." (Emphasis ours.) 220 U. S. 406, 55 L. Ed. 518.

The Court then quotes from the case of *Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., A. C.,* p. 565, 6 Eng. Rul. Cas. 413, as follows:

> "But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford *adequate protection to the party in whose favor it is imposed,* while at the same time it is *in no way injurious to the public."* 220 U. S. 406-7, 55 L. Ed. 518. (Emphasis ours.)

Because of the paramount importance of the public interest, any price fixing agreement where there is a potential power to fix prices to the consumer is *per se* illegal. But, where there is no effect on con-

sumer prices, a price stabilization agreement is valid unless it is clearly unreasonable as between the parties to the agreement.

The principal case relied upon the government and by the Court below, in holding that the rule of reason did not apply, is *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 84 L. Ed. 1129. This must be construed in the light of previous cases, none of which it purported to or did overrule. Actually, it is consistent with those cases if properly analyzed. Again and again in the *Socony-Vacuum* case emphasis is placed on the fact that consumer prices were affected by the combination. (See Appendix T, pp. 73-74, for statement of the Court on this point.)

Whereas in the present case the trial Court refused to permit any consideration of the effect upon consumer prices, in the *Socony-Vacuum Oil* case, the continued emphasis on consumer prices indicates that as constituting the matrix of the case. The Court, in the *Socony-Vacuum* case, did not ignore the *Appalachian Coals* case. It considered that case and distinguished it on precisely the grounds here urged on behalf of defendants:

> "And it observed that the plan did not either contemplate or involve 'the fixing of market prices;' that defendants would not be able to *fix the price of coal in the consuming markets; that their coal would continue to be subject to 'active competition'*. To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied:

'The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that co-operative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the co-operation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result.' * * *

Thus in reality the only essential thing in common between the instant case and the Appalachian Coals Case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. *Unlike the plan in the instant case, the plan in the Appalachian Coals Case was not designed to operate vis a vis the general consuming market and to fix the prices on that market."* (Emphasis ours.) 310 U. S. 215-216; 84 L. Ed. 1164.

None of the distinguishing factors found in the *Socony-Vacuum Oil* case are present here. *All* of the distinguishing factors found in the *Appalachian Coals* case are present here.

Every source examined indicates that combinations of working producers such as the fishermen here do not and can not increase the price to the consumer. Many of the sources have been previously cited. In the House Report on the Fishermen's Marketing Act, it was pointed out that associations of working producers to fix prices are common in Europe, and that the effect has not been to increase prices. (1934 House Reports, No. 1504.)

By reason of the mechanical application of the correct rule that when combinations of industrial capital engage in price fixing agreements, they are *per se* illegal, and by ignoring the fact that the anti trust laws were enacted primarily for the protection of the consumer against great combinations of capital, the Court below reached the conclusion that the *per se* rule applied to working fishermen seeking price fixing agreements with middlemen. As a result of this conclusion the Court refused to give instructions on the rule of reason and in fact instructed the jury that the rule of reason did not apply, thus committing prejudicial error.

5. Applicability of the rule of reason to the facts of the present case.

Unquestionably the leading case most nearly in point to the present case, both on the questions of

fact and law, is the *Appalachian Coals* case. In that case the combination consisted of approximately 75% of the producers of a certain type of coal in a specified area. In this case less than 75% of the market fishermen in the Southern California area are included in the combination.

In the cited case the Appalachian Coals Co. was a selling agent to whom the members of the company delivered their coal for sale by the company to various customers. However, in addition, the company set the prices at which its members sold some of their coal to customers of the members, thus acting partially as a sales agent and partially as a kind of collective bargaining agent. In the instant case the combination of fishermen sought to act through only one of the two methods followed in the cited case, the method selected by them being to have the association act as a bargaining agent for the members, with the members to make individual sales to the dealers.

The District Court in the *Appalachian Coals* case found that the combination would have the tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition, but that the combination would not have the power to fix monopoly prices. In the present case the facts are even more favorable to the defendants. Their activities could not increase the price at the consumer to any extent, and at the level of their dealing with the middlemen they had to meet competitive prices of fish from the areas in any price agreement which they entered into with the Southern California

dealers, as well as the competition of other proteins which control the price of fish on the consumer market.

Next the Supreme Court stresses the economic condition of the industry, pointing out the condition of surplus production with a substantial relative decrease in consumption. In the present case the low earnings and great insecurity of the fishermen are abundantly clear. The fact that the Southern California area has a per capita consumption of fish about 50% less than the average throughout the United States and that the production of fish has remained constant in this area, while increasing by leaps and bounds in the areas where fixed price stabilization agreements have been signed, are economic factors of the same type as were given consideration in the *Appalachian Coals* case.

In the *Appalachian Coals* case the Court noted that the unfavorable conditions had been aggravated by particular practices with respect to what is known as "distress coal", that is, coal in certain sizes for which orders on the market are lacking. This can be compared to the situation of the fisherman who is compelled by conditions of nature and the Fish and Game laws to concentrate a great proportion of his catch in a short period of time, thus throwing on the market more fish than there is any demand for as of that particular time. As a result, he must accept "distress" prices while the middleman can sit back and hold his fish for all year around sale, thus maintaining constant prices in the retail market.

In the cited case the Court takes note of the fact that if coal is not sold the charges for storage, etc., "may exceed the amount obtainable for the coal." In this respect, the fisherman has an even more serious problem. If his product is not sold, it deteriorates and its value is destroyed completely, and what is more, he commits a criminal violation of law and is subject to having his license as a fisherman revoked.

Just as in the cited case, the producers of coal usually have no storage facilities of their own, so the fisherman has none. Moreover, the fisherman, for reasons which have been set forth, is not even in a position to utilize the storage facilities of others. He can do one thing and one thing only and that is sell his fish at whatever price he can obtain.

In the *Appalachian Coals* case it was pointed out that organized buying agencies "constitute unfavorable forces" because "the highly organized and concentrated buying power which they control and the great abundance of coal available has contributed to make the market for coal a buyer's market for many years past." The fisherman is constantly faced with a buyer's market.

In the cited case stress is placed on the unprofitable condition of the industry and the lack of local consumption in the area of production. The same factors exist for the fishermen in the Southern California area. At a time when throughout the country the problem was one of being able to purchase rather than to sell products at O.P.A. prices, at a time when

the economy was threatened not by low prices but by the black market, we find it necessary for the fishermen to combine in order to try to obtain the O.P.A. prices. Under conditions when the fishermen had to pay O.P.A. prices for everything which they purchased, they were simply trying to obtain O.P.A. prices for the fish that they caught. This is one of the best demonstrations of the relative weakness of the fishermen as compared with other groups in our economy. As a result of such weakness, the workers in the industry earned from $800 to $2500 a year, less than workingmen employed in the lowest paid categories. To say that the fishing industry was unprofitable to fishermen is indeed to put the matter mildly.

In the *Appalachian Coals* case an important factor was that the combination would not prevent substantial active competition in the sale of coal in all the markets in which Appalachian coal was sold. The small volume of fresh market fish caught in the Southern California area as compared with the competing fish caught elsewhere renders absolutely impossible the limitation of active competition in the sale of fish in all markets.

In the cited case consideration is given to the purposes for which the defendants organized themselves, such as to bring about "a better and more orderly marketing of the coal from the region", to enable the defendants "more equally to compete in the general market", to remedy certain destructive dumping practices, to promote the study of marketing and dis-

tribution of coal, to demonstrate the advantages and suitability of Appalachian coal, to promote an extensive advertising campaign and to provide a research department to deal with problems relating to the use of coal. Reference to our statement of the case will indicate precisely the same objectives were sought by the defendants in this case with relation to fresh market fish.

The Court in the *Appalachian* case notes that the record "fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions, in view of the vast volume of coal available, the conditions of production, and the network of transportation facilities at immediate command." 288 U. S. 363, 77 L. Ed. 834. Factors in the present case which require a similar conclusion are the value of fish available from other areas; seasonal nature of the industry; the restrictions placed upon fishermen by Fish and Game regulations; the natural monopolistic position held by dealers; the fact that fishermen have to compete with foreign fishing industries given governmental assistance and with agricultural and other economic groups in the United States which by reason of governmental assistance or otherwise, are in a much superior position to that of the fishermen; by the fact that the consumer receives no benefit from fluctuation of prices to fishermen because the dealer can wait for a favorable consumer market; by the small number of dealers as compared with the great number of fishermen and the resulting domi-

nant financial position of the dealers enabling them to unilaterally set the price that they will pay for fish; by the economic dependence of the fishermen upon the dealers as shown by their periodically regular indebtedness to the dealer; by the fact that organization in other areas has resulted in an increased production, whereas lack of organization in Southern California has prevented development of the fishing area; and by the fact that the fish coming from the organized area has been able to compete effectively with fish from the unorganized area. (See Appendix U, pp. 75-77, for further discussion of this point.)

In the case of *Board of Trade v. U. S.,* 246 U. S. 231, 62 L. Ed. 683, supra, the Court considered a number of factors in applying the rule of reason. It pointed out that the rule under consideration there "had no appreciable effect on general market prices" but that "within the narrow limits of its operations the rule helped to improve market conditions." It was noted that the rule in question enabled men to buy and sell with adequate knowledge of actual market conditions and that a lack of such knowledge was particularly disadvantageous to country dealers and farmers. It is precisely the lack of knowledge about the condition of the market and what he can get for his fish after he has caught it which makes the condition of the fisherman so precarious and so economically unsound. In the *Board of Trade* case it was noted that the rule had the effect of bringing products into trading in the regular market hours of the Board. Here, as we have noted by the collective

bargaining history in other areas, the effect thereof has been to increase the overall supply of fresh market fish. Far greater justification exists here for the contract sought by the defendants than existed in the *Board of Trade* case for the rule imposed by it upon its members.

The problems of the fishermen were well summarized in the investigation of concentration of economic power by the U. S. Senate Temporary National Economic Committee, when on Friday, February 21, 1941, Honorable Sumner T. Pike, the Commissioner of the Securities and Exchange Commission, testified:

> "Mr. Chairman, I am afraid this is off the subject, but it has been quite impressive to me *how similar each one of these problems in agricultural distribution is to one smaller, much more neglected, but still quite important part of our industry, that is fish.* The thing that was just mentioned about marketing on the West Side of New York, in Washington Street, is, I think, even more true of the East Side, the Fulton Market. I lived within sight, and most distinctly within smell, of that market for some years, and could see it from my office window, and we have the same problem of small return to the fishermen, a tremendous spread between his price and the consumer's price. Of course, we have the much more serious problem, probably, of perishability, and in almost every detail the thing seems to be parallel, except that your problem is much bigger, *but ours is just as serious to those of us who live on the seacoast,* and it has been, I think, a com-

> paratively neglected area, I suppose because it is such a small thing in comparison with the bigger problem you present. * * *" TNEC Reports, p. 405.

To refuse to apply the rule of reason to the facts of this case is truly unreasonable.

Summary.

A working original producer can not by combination or association acquire the economic power to control the market price, to affect the price to the consumer or to otherwise unreasonably restrain competition. To the contrary, the original working producer is in such a weak position economically that only by combination for the purpose of setting reasonable prices can reasonable competition between himself and the middleman, economically much more powerful, be maintained. Only thus can the original working producer obtain a reasonable share of the price which the consumer must ultimately pay. The rule of reason does not apply to price fixing arrangements entered into by industrial aggregations because such combinations have the potential power to harm the consumer. It should and does apply to price fixing combinations of original working producers not only because they lack that power but because it is in the public interest that they should receive a larger share of the consumer dollar than they now receive. The rule that price fixing agreements are *per se* invalid applies to those situations where there is a potential effect upon consumer prices. It does

not apply where, as here, there is no such potential effect. Nowhere, in any of the cases where the rule of reason was applied, was there greater necessity or justification therefor than in the present case. For these reasons the improper instructions and the refusal to give correct instructions on the rule of reason by the trial Court constituted prejudicial error.

E. THE COURT ERRED IN INSTRUCTING THE JURY WITH RESPECT TO THE BURDEN OF PROOF UPON THE GOVERNMENT TO ESTABLISH THAT THE CONSPIRACY CHARGED, IF EFFECTIVE, WOULD HAVE DIRECTLY AFFECTED INTERSTATE COMMERCE.

1. Instructions given by the Court.

With respect to the necessity for proving a restraint upon commerce, the Court instructed the jury as follows:

> "Any alleged or proved restraint by one or more of the defendants with the business of any so-called individual fish dealer or dealers mentioned in this case is not the controlling factor to be considered by you in arriving at your verdict in this case. The Government must prove a conspiracy to restrain in a substantial way the charge made in the indictment." (Tr. 1938.)

Defendants objected to this instruction on the ground that by it the Government was not required to prove that the alleged conspiracy would have had a direct effect upon commerce.

Specifically the defendants objected as follows:

"The Court. No, it doesn't have to be direct.
Mr. Margolis. With regard to defendants' instruction No. 4, we want to show that our objection to the refusal to give that instruction is an objection to give the instruction in the manner that it was last worded by your Honor, not as originally phrased by us.
Do I make myself clear on that point, your Honor? In other words, we object to the failure to give an instruction reading as follows:

> 'I further instruct you that in this case the government must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish. * * *'" (Tr. 1803.)

2. Applicability of the instructions to the facts of this case.

Without reviewing the applicable evidence it is sufficient to point out that defendants' contention, which was supported by evidence, is that the intent of the agreement sought by the defendants was to have the fishermen know in advance what they would get for their catch before they went fishing, and that any alleged effect upon commerce was minor and indirect.

Unless the conspiracy to restain commerce is intended to have a direct effect upon commerce, it does not constitute a violation of the Anti-Trust Laws.

In the case of *Industrial Association of San Francisco v. U. S.*, 263 U. S. 64, 69 L. Ed. 849, defendants were prosecuted under the Anti-Trust Act because of an agreement between a union and employers requir-

ing permits for the use of building material in the State of California. The Supreme Court considered and approved of the argument that this agreement would affect only indirectly the shipment of supplies into the State, by saying:

> "This is to say, in effect, that the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that trade in them, to that extent, would be diminished. But this ignores the all-important fact that there was no interference with the freedom of the outside manufacturer to sell and ship, or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and, therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect, and remote,—precisely such an interference as this court dealt with in United Mine Workers v. Coronado Coal Co., supra, and United Leather Workers International Union v. Herkert & M. Trunk Co., 265 U. S. 457, 68 L. Ed. 1104, 33 A.L.R. 566, 44 Sup. Ct. Rep. 623."

In a well reasoned District Court opinion in the case of *United States v. Bay Area Painters & Decorators Joint Committee,* 49 Fed. Supp. 733, Judge St. Sure of the District Court for the Northern District of California, Southern Division, said:

> "From this language it is reasonable to infer that where a union *does* combine with non-labor groups the end to which its activities have been the means should be considered. It is easy to see

> the widespread evils that could result if employers were permitted to join with the unions in all activities exempted by the Clayton and Norris-LaGuardia Acts. Industry within the State could by direct means virtually eliminate competition with other states. But where the demands of the union for certain 'terms and conditions of employment', considered apart from their activities in obtaining them, appear reasonable, an acceptance thereof by the employers should not render them unreasonable and unlawful, even though indirectly a restraint on interstate commerce may result, so long as such restraint is not the direct intent of the agreement."

Among the early cases decided by the Supreme Court under the Anti-Trust law is *Hopkins v. United States,* 171 U. S. 578, 43 L. Ed. 290, in which the Supreme Court held that an agreement with respect to services, which agreement might indirectly affect commerce, is not within the scope of the anti-trust law. At the same time, the Court decided the case of *Anderson v. United States,* 171 U. S. 604, 615-16, 43 L. Ed. 300, 306, wherein the Court ruled to the same effect, saying, in this connection:

> "Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where

> it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

See also *Levering & G. Co. v. Morrin,* 289 U. S. 103, 77 L. Ed. 1062.

Upon the basis of the foregoing authorities, it is submitted that the Court erred in its instructions on this point.

F. THE COURT ERRED IN INSTRUCTING THE JURY THAT IF THE ALLEGATIONS OF THE INDICTMENT ARE TRUE, THE DEFENDANTS ARE TO BE FOUND GUILTY.

1. The instructions given.

The Court instructed the jury as follows:

> "If the Government proves beyond a reasonable doubt that the defendants or any two or more of them combined and conspired to restrain interstate or foreign trade and commerce in fresh fish, as alleged in paragraph 12 of the indictment (which was paragraph I paraphrased to you a while ago), any defendants who you may find were members of or participants in such a conspiracy would be guilty as charged in the indictment." (Tr. 1937.)

The defendants objected as follows:

> "We object on the following grounds, that the indictment does not state a cause of action and

that therefore proof of the facts set forth in the indictment are not sufficient for any purpose. And, second, that even if the facts alleged in the indictment are proved it doesn't allow for the establishment of defenses such as the defendants were operating under the Fishermen's Marketing Act and exempt under the Clayton Act, and subject to the interpretation that if the government proves the facts set forth in the indictment that then the defense of the Fishermen's Marketing Act, and the defense of the Clayton Act and the defense of the rule of reason will not apply." (Tr. 1787.)

2. The instruction given was erroneous.

It appears that on the face of the indictment that the subject matter thereof is a combination of fishermen, who, as working original producers, combined for the purpose of fixing the price of the products of their own labor. Because original producers are not covered by the Sherman Anti-Trust Act and because they are exempted by the terms of Section 6 of the Clayton Act and by the Fishermen's Marketing Act, such a combination does not constitute a restraint of trade in violation of the Sherman Anti-Trust Act. Defendants' contentions in this regard have been fully covered above.

G. THE COURT ERRED IN INSTRUCTING THE JURY CONCERNING PICKETING AND BOYCOTTING.

See Appendix V, pages 78-79, for instruction given by the Court.

The italicized portions of the instruction are erroneous and prejudicial. Appropriate objections were made by appellants. (Tr. 1829, et seq.) In the context of the present case those instructions contributed to a miscarriage of justice.

In addition to the erroneous instructions above specified, error is assigned for the refusal of the Court to give the instructions set forth in Appendix W, pages 80-81, all of which were proposed by the defendants and which deal with the same subject matter.

It is argued elsewhere in this brief that the Fishermen's Cooperative Marketing Act should have compelled a direction to acquit. The Court did in fact read some of that statute to the jury. (Tr. 1940, *et seq.)* Furthermore, as is seen by the foregoing, the Court told the jury that picketing and boycotting were not "contrary to or in violation of any law." Yet somehow, the combination of these two lawful classes of conduct,—cooperative marketing and picketing,—became illicit and criminal.

First, it is plain that the Sherman Act was not designed to prevent disruptions of interstate commerce by picketing, boycotting, or even by violence. Since the time of the extended discussion of this question in the *Apex* case, it has been unnecessary to argue this point. *Apex Hosiery v. Leader,* 84 L. Ed.

1311, 310 U. S. 469; *United Leather Workers,* etc. case, 265 U. S. 457, 68 L. Ed. 1104, 33 A.L.R. 566; *First Coronado Coal* case, 259 U. S. 344, 66 L. Ed. 975.

In the present case it is important to point out that the foregoing rule was not to be construed as an exemption in favor of labor, or an exemption due to the character of the defendant. The fact is that such conduct was held not to be a violation of the Sherman Act, regardless of who was the actor.

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.' These elements of restraint of trade, found to be present in the Second Coronado Coal Co. case and alone to distinguish it from the First Coronado Coal Co. case and the United Leather Workers International Union case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in

> labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the Second Coronado Coal Co. case. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable to the activities of respondents which had an even less substantial effect on the competitive conditions in the industry than the combination of producers upheld in the Appalachian Coals case and in others on which it relied." (pp. 1333-4.)

In the instant case, however, the trial Court instructed the jury that contracts obtained by means not peaceful constituted violations of the Sherman Act, because of the manner in which they were obtained. This was erroneous.

In the *Apex* case it was said:

> "The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because without other differences, they are attended by violence." (p. 1334.)

Although, it is submitted, the question has been settled by the *Apex* case, it is interesting to reflect on

the consequences of the Court's instruction. The meaning of the instruction given is that the law of duress in commercial contracts is imported into the Sherman Act, and a contract otherwise valid constitutes a violation of the Sherman Act if it is obtained by means of picketing. The result of such a theory would be that every contract in interestate commerce which one of the parties claims to have been procured by any means which vitiates consent is a criminal act and is subject to prosecution by the United States government. Fortunately such a theory cannot survive the opinion in the *Apex* case which made clear that the importation of violence into a transaction otherwise not in restraint of trade did not constitute a violation of the Sherman Act.

A great deal of evidence was received (over the defendants' objections) concerning picketing and the other activities of the defendants in their effort to get a contract with the dealers (the propriety of the admission of this evidence is argued elsewhere). As is shown in the statement of facts the evidence concerning picketing was detailed and repetitious. There was even evidence of the effect of the picketing on dealers, shipping agencies, and other fishermen. In fact the transcript reveals that the trial was conducted as though one of the principal issues was the conduct of the defendants in picketing and trying to get the contract. The Court's instruction that a co-operative marketing agreement, otherwise lawful, was a violation of the Sherman Act therefore could only have been understood by the jury as an instruction dealing with a critical phase of the case.

The error of the Court is not mitigated by the language of the instruction pointing out that picketing and boycotting are not unlawful. The exculpation is clouded by the Court's telling the jury in the next sentence that picketing and boycotting may nevertheless be considered as evidence of whether the defendants "did or did not combine or conspire *as alleged in the indictment*". This immediately reinstates the criminal character of picketing and boycotting. But in any event, the Court's statement that picketing and boycotting are not unlawful, in the context of the present case, creates a direct ambiguity which no analysis or ratiocination can dispel. If the conduct of the fishermen in collectively fixing a price was lawful, and if picketing and boycotting were not unlawful, then here were a lawful means and a lawful purpose. If that is true, what was meant by instructing the jury that a price fixing contract not voluntarily entered into was a violation of the Sherman Act?

It is settled law that where conflicting instructions are given as to a material issue in the case, this is prejudicial error. *(Notary v. U. S.,* 16 F. (2d) 434, 49 A.L.R. 1446 (CCA 8th 1926); *Sunderland v. U. S.,* 19 F. (2d) 202, 215 (CCA 8th 1927); *Nicola v. U. S.,* 72 F. (2d) 780 (CCA 3rd 1934); *American Medical Assn. v. U. S.,* 130 F. (2d) 233 (CCA DC 1942); *Thomas v. U. S.,* 151 F. (2d) 183 (CCA 6th 1945).)

The instruction in the *Notary* case, supra, was subject to the same defect. It read as follows:

> "Now, as I have said before, no liquor was sold, no liquor was kept, on these premises. So

the sole question for you to decide is whether, first, these defendants maintained a place where liquor was kept for an unlawful purpose, as the statute defines it (and any customer who brought liquor in there and drank it on the premises was committing an unlawful act); and, secondly, whether either of these defendants actively within the meaning of that statute directed, aided and abetted or counseled or induced them to violate the law. If they did, they are guilty. If they did not, they are not guilty." (p. 438.)

The reviewing Court held the instruction erroneous and reversed the case. It is apparent that the conflict was between the statement that no liquor was kept on the premises, and the submission of an issue to the jury to determine whether liquor was kept for an unlawful purpose. The similarity to the case at bar seems plain. The instruction that picketing and boycotting are not unlawful coupled with the instruction that a marketing agreement which was not voluntary constituted a restraint of trade was so conflicting as to require reversal.

In the *Nicola* case, supra, the Court said:

"Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn." (Citing numerous cases.)

Id. 787.

H. THE COURT ERRED IN ADMITTING EVIDENCE ON PICKETING AND BOYCOTTING.

So much evidence was received concerning picketing and boycotting by the defendants that it is impractical to set it all out here. See Appendix X, pages 82-86, for illustrations of such evidence and of the nature of the objections introduced.

This evidence (together with the instruction given by the Court concerning involuntary agreements with a fishermen's cooperative) indicates that the case was tried on an erroneous theory, notwithstanding the objections of the defendants. In view of the undisputed evidence of concerted action by the defendants, through Local 36, evidence of picketing activity cannot be justified on the ground that it showed a combination. It was offered and received on the theory that the manner in which the contract under the Fishermen's Cooperative Marketing Act was sought determined whether it was in restraint of trade. (See argument made under the heading "The Court erred in instructing the jury concerning the Fishermen's Cooperative Marketing Act and concerning picketing and boycotting.")

That this evidence was prejudicial is manifest. The agreement sought by the fishermen was not unlawful; the Court gave an instruction concerning the propriety of joint action by fishermen under the Fishermen's Cooperative Marketing Act. But, as is elsewhere argued, the Court instructed the jury that if such agreements were not entered into voluntarily they constituted a violation of the Sherman Act. The evi-

dence of picketing and boycotting could therefore only have been understood by the jury as evidence showing a conspiracy by the fishermen to get an agreement from the dealers which would not be wholly voluntary; and that evidence could only have been understood as showing a violation of the Sherman Act.

It is submitted that the admission of this evidence over defendants' objections necessitates a reversal.

II.

THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE OFFERED BY THE APPELLANTS. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 8. Tr. 2581.)

A. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUE OF THE APPLICABILITY OF THE FISHERMEN'S MARKETING ACT.

1. The rejected evidence.

After the Court had indicated its position with regard to the admissibility of certain kinds of evidence offered by the defendants, the defendants were allowed to make offers of proof as though the witnesses were on the stand and as though the appropriate questions to lay the foundations for the offer of proof had been asked and objections thereto sustained. One such offer was rejected by the Court on the grounds of immateriality and remoteness and that the evidence offered was self-serving and didn't tend to prove or disprove any issue in the case. (Tr.

1423.) This offer of proof was presented on April 21, 1947, Exhibit TT,[1] and in it the defendants offered to prove through the witness Kibre the following:

In 1942, Local 36 carried on marketing experiments regarding the canning of barracuda and for the purpose of these experiments the members of Local 36 accepted lower prices than otherwise would have been obtained. (Exhibit TT, page 17.)

Under date of April 26, 1947, the defendants submitted a written offer of proof (Exhibit GG-1), in which they offered to prove certain matters through John B. Schneider, testifying as an expert in economics specializing in agricultural marketing and as a marketing and economic consultant. An objection was sustained on the grounds that the offer was incompetent, irrelevant and immaterial. (Tr. 1688-91)[2]. Through this witness the defendants offered to prove (a) the fisherman is in the same position economically as a farmer (Exhibit GG-1, pages 2-3); (b) collective bargaining associations among farmers are common and there are a large number of such associations in California, some of which are specifically named in the offer of proof. The functioning of such associations has established as a matter of practice that they do not result in those evils which usually flow from monopolies. (Exhibit GG-1, pages 13-15.)

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[1]For purposes of convenience, this offer of proof will hereinafter be referred to as the General Offer of Proof.

[2]For purposes of convenience, this offer of proof will hereinafter be referred to as the Schneider offer of proof.

2. Admissibility of the offered evidence.

The rejected evidence was material in that it showed first, that Local 36 conducted activities relating to the marketing process, and second, that collective bargaining associations constitute an established and recognized form of collective marketing organization, accomplishing objectives similar to those of other forms of collective marketing associations.

The evidence offered was apparently rejected because of the Court's theory that the Fishermen's Marketing Act does not apply to organizations which merely bargain collectively for their members. That this is not the law has been fully argued above.

B. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUE OF THE APPLICABILITY OF SECTION 6 OF THE CLAYTON ACT.

1. The rejected evidence.

a. The Court refused to permit the introduction of Exhibit O, a letter of June 5, 1944, from Local 36 to all Southern California fish dealers, outlining in detail the purposes and intentions of the union and inviting the dealers to a meeting to discuss the much needed stabilization program. Defendants offered this for the purpose of establishing the kind of an organization Local 36 was, but the offer was rejected as immaterial. (Tr. 1294-5.) See Appendix Y, page 87, for the proceedings as they related to defendants' Exhibit O for identification.

b. The document entitled "A Message to All Market Fishermen", which was circulated among fishermen for the Southern California area about June 12, 1946, by Defendant Local 36 was marked Exhibit P for identification, and was likewise offered to show the character of the organization. Objection was sustained on the ground that the document was immaterial and self-serving. (Tr. 1299-1302.) See Appendix Z, page 88, for excerpts from the record relating to Exhibit P.

c. Marked as Exhibit Q for identification was a letter from defendant Local 36 to all Southern California fish dealers, dated July 10, 1944, asking the dealers to enter into negotiations for an agreement relative to the price and conditions of delivery of fresh fish. The objection to the introduction of this letter was sustained. (Tr. 1304-5.) See Appendix AA, page 89, for excerpts from the record relating to Exhibit Q for identification.

d. Exhibit X and X-1 for identification are copies of National War Labor Board award treating prices paid to fishermen as wages. An objection to these documents on the grounds that they were incompetent, irrelevant and immaterial was sustained. (Tr. 1360-1.) See Appendix BB, page 90, for excerpts from record relating to Exhibit X and X-1 for identification.

e. In the general offer of proof, Exhibit TT, defendants offered to prove through the witness Kibre, the following: The organization of fishermen on the

Pacific Coast on a labor union basis has a long history going back at least to 1886 (Details given in offer of proof) in which period of organization there have been many strikes and related activities for the purpose of achieving minimum price agreements. Continuously since 1900, up to and including the present time, numerous minimum price agreements have been negotiated and placed in effect in various areas of the Pacific Coast. Copies of some of such agreements were marked as Exhibits A-1 to A-129, inclusive, and were included in the offer of proof. All of such agreements were entered into between working fishermen, including boat owners, and buyers of fish. In various disputes with relation to such minimum price agreements, the U. S. Conciliation Service of the Department of Labor has participated through its representatives in negotiations. Exhibit A-131, for identification, which was part of the offer of proof set forth the facts concerning one such negotiation meeting. At times the Maritime Conciliation Service was also used in negotiations. During the war, the National War Labor Board in more than 12 cases set the prices of fish as constituting the wages of fishermen. (Exhibit TT, pages 4-15.)

f. The Schneider offer of proof included the following: A fisherman is a laboring producer as distinguished from a capitalist or entrepreneur. Because of his economic weaknesses as compared with the buyer, the fisherman is in the position of a "selling employee." (Exhibit GG-1, pages 3-4.)

2. Materiality of the evidence.

All of the offered evidence tends to establish that historically and from an economic standpoint fishermen have organized to bargain for the price of the fish they catch as a means of having some voice in the amount that they should be paid for the expenditure of their labor. The evidence offered was apparently rejected on the theory that no employer-employee relationship existed and that, therefore, the Clayton Act does not apply. That the evidence and the law require a contrary conclusion has been argued above.

C. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUES OF THE APPLICABILITY OF THE RULE OF REASON AND TO THE PROPOSITION THAT ORIGINAL WORKING PRODUCERS ARE NOT PROHIBITED BY THE ANTI-TRUST LAWS FROM COMBINING HORIZONTALLY FOR THE PURPOSE OF FIXING PRICES.

1. The rejected evidence.

a. The general offer of proof contained the following proffered through the witness Kibre: (Exhibit TT.) Prior to unionization of fishermen, there was great fluctuation in the prices paid to the fishermen. Such payments were extremely low on the average and shortweighing of fish was a common practice. As a result the fishermen were in a chronic state of economic distress, so great that in many periods there was an absolute inability to maintain subsistence earnings, such earnings falling as low as an average of $300 a year. (Exhibit TT, pages 1-4.)

For many years, there has been in effect a Fish and Game regulation requiring that fishermen obtain a secured market before going fishing. Where collective bargaining agreements exist, this rule has been complied with. Elsewhere, including the Southern California area, compliance with this rule has been impossible for fishermen engaged in market fishing because in the absence of a collective bargaining agreement, the dealers simply refuse to give advance orders. (Exhibit TT, page 11.)

Where collective bargaining agreements have existed there have been great increases in the harvesting of fish. Where there have been none, there has been no such increase. (Exhibit TT, pages 15-16.)

At a time in May of 1947, when the price of barracuda dropped from 20¢ to 6¢ per pound to the fisherman, the retail price remained constant at 55¢ to 65¢ with inadequate supplies in the market. As a result of a conference initiated by the Fishermen's Union, the price to fishermen was raised to 10 to 12¢ a pound and the price to consumer was simultaneously reduced to 38 to 40¢ per pound. (Exhibit GG, pages 16-17.)

b. In the general offer of proof, defendants proffered testimony of a number of market fish dealers that a much larger quantity of fish in terms both of pounds and dollar value comes in from areas outside Southern California than is caught in that area. (Exhibit TT, pages 17-19.)

At any given time, each of the dealers in the various Southern California ports pays the same price to the fisherman. Any change in price takes place simultaneously among the dealers in each port. The prices to fishermen drop as much as 500% in a single day with increases never occurring in jumps of more than one or two cents a pound. The prices paid fishermen bear no relationship to the amount charged by the fish dealer. (Exhibit TT, pages 19-21.)

c. In the Schneider offer of proof appears the following: It is a basic principle of economics that joint action on the part of primary producers of a seasonal and perishable product, to improve prices to the producers is beneficial rather than harmful to consumers. (Exhibit GG-1, page 2.) The fisherman is in the same economic position as the farmer. He is in an economically weak bargaining position as compared with the buyer. The fisherman is in a particularly difficult position with respect to his inability to hold his product for a fair price and is constantly forced to sell under conditions of forced sale. (Exhibit GG-1, pages 3-5, 9-10.)[3]

The fisherman is subjected to the natural processing factors over which he has no control whatsoever. (Exhibit GG-1, pages 4-5.)

The dealer, as distinguished from the fisherman, is an entrepreneur who primarily is investing his money in hope of making a profit. (Exhibit GG-1,

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[3]Regarding inability of fishermen to sell fish, see also Offer of Proof, Tr. 1716-17, giving details thereof.

page 6.) The dealer operates on a much larger scale than does the fisherman and because of resulting advantages is not dependent upon any individual fisherman in order to obtain the product. (Exhibit GG-1, pages 6-7.) The dealer, as distinguished from the fisherman, does not have to participate in forced sales because he is in a position to hold the fish for a fair price. (Exhibit GG-1, pages 7-8.)

Market fish competes with all other proteins and its price to the consumer is determined by the price of other proteins. Fish cannot be sold on the consumer market at prices out of line with other protein prices. (Exhibit GG-1, pages 8-9.) When large amounts of fish are caught at any one time, the price to the fisherman goes down, but there is no reduced price to the consumer as a result. The dealer simply stores and holds the fish while maintaining a constant supply on the consumer market. (Exhibit GG-1, pages 10-11.) Increased prices to the producer tend to increase *overall* production, and this has a tendency to reduce prices to consumers. (Exhibit GG-1, pages 11-12.)

Agricultural organizations get governmental help, but fishermen receive none, or practically none. (Exhibit GG-1, page 13.)

d. Defendants also submitted a written offer of proof prepared by the California CIO Council Research Department (Exhibit GG), which was rejected as incompetent, irrelevant and immaterial. (Tr.

1688-91.)[4] In this offer of proof, the following was submitted: The price of fish is determined by factors outside of the control of the men who fish for fresh market fish. The prices paid to the fishermen for approximately one-third of their fresh fish are guided by cannery prices for the same species. Retail prices are determined by the price of fresh fish from other areas. The volume of out of state or Northern California fresh fish far outweigh Southern California fresh fish sold in the Los Angeles market. (Exhibit GG, pages 28-33.)

Fresh market fishermen average between $628 and $1022 annually from fresh fish sale. (Exhibit GG, pages 34-6.) In this connection offers of proof of the earnings of the individual defendants were made,—said earnings fitting in with the general pattern set forth above. The share received, by those defendants who owned boats, for the use of the boat has been inadequate to compensate the boat owners for their work in maintaining and repairing the boat upon the same time basis as the compensation received by them as their share for catching the fish. (Exhibit GG, pages 34-6, Tr. 1498-8, 1498-1500, 1663-5, 1265, 1716-20.)

2. The Court's rulings were erroneous.

All of the evidence offered dealt with matters which again and again have been recognized as pertinent

[4]For purposes of convenience, this offer of proof will hereinafter be referred to as the Research Department Offer of Proof.

to the issue of the reasonableness of an agreement alleged to be in restraint of trade. Thus, in the case of *Board of Trade v. U. S.*, 246 U. S. 231, 62 L. Ed. 683, 687, the Court said:

> "* * * But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. * * *"

See also:

Sugar Institute v. United States, 279 U. S. 553, 571, 80 L. Ed. 854, 862.

The rulings of the trial Court were apparently based upon the Court's theory that the rule of reason does not apply to the facts of this case. That the rule of reason does apply has been fully argued above.

D. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUE OF THE DIRECT AND SUBSTANTIAL EFFECT UPON COMMERCE OF THE CONSPIRACY CHARGED.

1. The rejected evidence.

a. In the Research Department offer of proof, the following appears: The crews of small boats in Local 36 constitute only a small fraction of the fishermen in the Southern California area; fresh market fish is brought in by many fishermen who are not members of that local. (Exhibit GG, pages 1-8.)

The small boat fishermen (Local 36 is made up entirely of such fishermen) in Southern California number 1437 of whom 747 are members of Local 36. Less than one-third of these fishermen engage regularly in fresh market fishing, and they compete with party boat fishermen and with large boats. (Exhibit GG, pages 9-16.)

The commercial catch of fish in year 1946 was substantially higher in Southern California than the catch in the last ten years and three times as high as the 1942 catch. The amount of landings is determined by such factors as the variable catch of species of cannery fish, such as mackerel and albacore. The fresh market fish catch varies between 1.8% and 3.1% of the total fish landings in the Southern California area. The small fleet catch consists of 87.6% cannery fish and 12.4% fresh fish. (Exhibit GG, pages 17-27.)

b. In the general offer of proof defendants proffered the testimony of various fish dealers to establish that during the month of June, 1946, each of the fresh

fish dealers in Southern California was able to and did buy all of the fish that he desired or could handle. No orders went unfilled because of lack of supply. There was no unfilled demand and there was no change in the normal or usual supply of fish in the Southern California area or in any other area in the five Western states set forth in the indictment. (Exhibit TT, pages 17-18.) See also the testimony of Alexander Waissbord, and Brigham Grastieg. (Tr. 457-65, 473-9) which was stricken and then rejected when submitted as an offer of proof. (Exhibit TT, page 19.)

2. The Court's rulings were erroneous.

The evidence offered related directly to the impact of defendants' conduct upon commerce and tended to establish that this case involves merely a local controversy. The Court's rejection of this evidence is submitted to be erroneous even under its own instruction that there must be a conspiracy to restrain commerce in a substantial way. (Tr. 1938.) Defendants' argument on this point has been covered above.

III.

THE DISTRICT COURT ERRED IN GRANTING THE MOTION MADE BY CERTAIN WITNESSES ON APRIL 18, 1947 TO QUASH SUBPOENA DUCES TECUM. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 11, Tr. p. 2581.)

The defendants subpoenaed the records of fish dealers. The subpoenas were quashed on the grounds that the evidence to be adduced from the records was

immaterial, and thereafter offers of proof were made which are fully discussed under II, C, 1, b, pages 137-138 above and II, D, 1, b, pages 142-143. (Tr. 860-4, 1289-90, 1423.)

IV.

THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OFFERED BY THE APPELLEE. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 7, Tr. p. 2581.)

A. THE DISTRICT COURT ERRED IN ADMITTING SUMMARIES OF CERTAIN ITEMS IN BOOKS OF ACCOUNTS WITHOUT PERMITTING ADEQUATE INSPECTION BY THE DEFENDANTS OF ORIGINAL RECORDS IN ONE INSTANCE AND ANY INSPECTION OF THE ORIGINAL RECORDS IN OTHERS.

The witness Ross testified from a summary of certain portions of books of account (Government Exhibit 6) concerning the volume of fish handled by him as a fish dealer. This evidence was admitted subject to the right of the defendants to examine the original books. (Tr. 175-84, 187-9.) These books were produced at the office of the Anti-Trust Division and the representative of that division refused to permit defense counsel to continue with examination of the books because he disapproved of the method of examination. It was the contention of the presecution that the only right which defense counsel had was to check the books to see if the addition of the figures contained in the summary was correct. The defense, on the other hand, contended (1) that they had the right to examine the books for all purposes, and (2) that even for the purpose of checking the accuracy of the records there are other methods besides simple addi-

tion which they wished to pursue. Although the only opportunity to examine the books lasted for about one hour—to check a summary which had taken several days to prepare—the Court refused to allow further inspection of the books and denied defense counsel's motion to strike Government's Exhibit 6 and all evidence based thereon. (Tr. 294-309.) See Appendix CC, pages 91-96, for colloquy between the Court and counsel on this subject.

In other instances the Court over objections, permitted summaries of, or parol evidence, concerning the contents of books of account without allowing any opportunity to examine the original books upon which the summaries or parol evidence were based despite demands for such examination. (Tr. 324-6, 385-93, 860-4.)

The law on this subject appears to be so elementary and universally recognized that reference to *Corpus Juris Secundum* as authority should suffice. Thus, it is stated that in the case of voluminous records, summaries are admissible "provided, the books, papers, or records themselves are properly in evidence, or the person objecting thereto has an opportunity to examine them." 32 C.J.S. 714-15. This is obviously a rule of convenience—not one intended to deprive parties of rights which they would have had if the original records had been introduced. The rule with respect to the purposes for which books and records may be introduced has been stated as follows:

> "A book or document offered in evidence, including public documents and records, as well

> as private documents and writings, must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor. * * *
>
> Documentary evidence properly admitted in a case, regardless of by whom it was introduced, may, as a general rule, be weighed and considered for or against either party, and, although it is introduced to prove a particular fact, or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes; but this rule does not apply to a writing used merely to refresh the memory of a witness." 32 C.J.S. 700.

Thus, it has been held that summaries of voluminous records are admissible in evidence by the prosecution where the original records "were equally open to inspection by the defendant." *U. S. v. Mortimer,* 118 Fed. (2d) 266, 269, certiorari denied 314 U. S. 616, 86 L. Ed. 496.

V.

THE INDICTMENT ON WHICH APPELLANTS WERE CONVICTED DOES NOT STATE A PUBLIC OFFENSE AGAINST THE LAWS OF THE UNITED STATES. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 1, Tr. p. 2580.)

From the face of the indictment, plus facts of which the Court may take judicial notice, it appears that the defendants were original working producers falling within the provisions of both the Fishermen's Marketing Act and Section 6 of the Clayton Act. It

follows that it was no violation of the Anti-Trust laws for defendants to enter into horizontal combination for the purpose of fixing the prices of their product, representing essentially the return for the expediture of their labor. The argument with respect to these matters has been covered above.

VI.

THE VERDICT AND FINDINGS OF GUILT ARE CONTRARY TO LAW; THE VERDICT AND FINDINGS OF GUILT ARE CONTRARY TO THE EVIDENCE, AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT;

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE AND AT THE CONCLUSION OF ALL OF THE EVIDENCE;

THE DISTRICT COURT ERRED IN DENYING THE MOTION OF THE ABOVE NAMED APPELLANTS TO STRIKE ALL EXHIBITS AND TESTIMONY;

THE DISTRICT COURT ERRED IN DENYING THE MOTION OF THE ABOVE NAMED APPELLANTS IN ARREST OF JUDGMENT;

THE DISTRICT COURT ERRED IN OVERRULING APPELLANTS' MOTION FOR A NEW TRIAL. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Points 2, 3, 6, 10, 12 and 13, Tr. pp. 2580-2.)

The evidence establishes that defendants are original working producers, that they have organized into an association which meets the requirements of both the Fishermen's Marketing Act and Section 6 of the Clayton Act, that they are engaged essentially in the selling of services, and in seeking an adequate return for the expenditure of human labor, and that

the agreements which they sought to obtain were reasonable ones within the meaning of the rule of reason as applied to the Anti-Trust law. It therefore follows that the trial Court erred in each of the respects set forth above. The arguments on all of these points have been set forth fully above.

VII.

THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS BASED ON THE GROUND THAT THE GRAND JURY WHICH RETURNED THE INDICTMENT WAS IMPROPERLY SELECTED, AND IN DENYING THE CHALLENGE TO AND MOTION TO STRIKE OUT THE ENTIRE TRIAL JURY PANEL. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Points 4 and 5, Tr. p. 2581.)

A. THE ISSUES.

At the appropriate time the appellants, the defendants below, hereinafter referred to as the defendants, filed a notice of motion to dismiss the indictment and of challenge to and motion to strike out the entire trial jury panel. The motion recited that the grand jury which returned the indictment was improperly selected "in that the said Grand Jury was drawn in such a manner that it was not an impartial Grand Jury drawn from a cross-section of the community, but that certain defined groups of the community, to-wit: laborers, people working by the day or hour, members of labor unions and Negroes were systematically and intentionally descriminated against * * *" and that defendants fall within the classes of

persons so excluded. That same discrimination was charged with relation to the selection of the trial jury panel. (Tr. 25-28.)

Testimony was produced by the defendants in support of the motion and at the conclusion of said testimony and prior to resting, the defendants moved to amend the motion to conform to proof by the addition of specific allegations of discrimination with respect to "operatives and kindred workers, domestic workers, service workers," and "Americans of Mexican descent" as well as discrimination in favor of "proprietors, managers and officials." (Tr. 2497-2502.) The motion was denied by the trial Court on the ground that the original motion was probably broad enough to frame the issues as set forth in the proposed amendment. (Tr. 2501.)

The motions to dismiss the indictment and to strike the jury panel were denied. (Tr. 2573.) Thereafter, a jury was selected; the defendants exhausted the peremptory challenges allowed by the Court and requested additional challenges, which request was denied. (Tr. 2574-8.)

The issues presented here are: (1) Is a jury panel properly selected when the method used for the selection of the prospective jurors is such that it *necessarily* leads to discrimination against certain groups in the community and, therefore, by reason of the system used results in the selection of an unrepresentative jury panel not constituting a cross-section of the community?

(2) Is a jury panel subject to attack on the grounds that its composition varies from a representative cross-section of the community to such an extent that the departure from such representativeness cannot be accounted for by chance alone but must be the result either of the system used or of deliberate purposeful discrimination?

(3) Does the evidence herein establish either the use of a system in selection of prospective jurors which system necessarily leads to discrimination, or a resulting selection so unrepresentative of the community as to indicate that it could not have been due to chance alone?

B. THE FACTS.

1. The method of selecting prospective jurors as shown by the evidence.

It should be noted first of all that purposeful discrimination, that is, any intentional motivated discrimination, is denied by those persons charged with the responsibility of selecting prospective jurors. (Tr. 2088-9, 2171-2.)

Names for persons to be brought in for jury service are selected in the first instance primarily by the jury commissioner with the clerk of the Court furnishing some few lists of names. (Tr. 1986-7.) From time to time the jury commissioner brings in lists containing widely varying numbers of names, and gives them to the clerk of the Court. (Tr. 2028, 2037.) There is no uniform system of obtaining lists. (Tr.

2099.) The present jury commissioner has, during his 16-year term of office, turned in to the clerk somewhere between 20,000 and 24,000 names. (Tr. 2158.) During the period from 1943 to the time of trial the jury commissioner turned into the clerk lists of names from the following sources:

(1) *The Southewest Blue Book (Exhibit U), to which the Commissioner's wife was a subscriber* (Tr. 2160). The Southwest Blue Book is a social register (Tr. 2129), the preface of which reads as follows:

> "With an unbroken record of 43 annual editions as its background, the Southwest Blue Book for 1947 adds still another to the long series. We believe the 1947 issue will sustain this publication's reputation as the standard society register of Southern California, the book having been carefully revised and brought down to date. The listing [250] of many eligible newcomers has augmented the already large roster of older first families; there are special sections devoted to the year's marriages, clubs and other features while an unusually large number of address and telephone changes will be noted. The editor wishes to thank her many patrons for ready cooperation which has greatly lengthened the work of compiling."

On May 17, 1945, the jury commissioner turned in 1680 names from this source. He testified that there was no particular reason for the use of the Southwest Blue Book except that he had to select some source from which to obtain names and that this seemed to be a good one. (Tr. 2147.)

(2) *The Ebell Club, a woman's club,* was the source of a list of 58 names on March 16, 1944. (Tr. 2137.)

(3) *The Friday Morning Club, another woman's club,* furnished the jury commissioner a list of 27 women upon his request, which list he turned into the clerk on March 27, 1944. (Tr. 2124, 2128, 2144.)

(4) *The telephone book* was the source of a total of 3878 names, turned over to the clerk in six separate lists during this period. (Tr. 2138, 2141, 2143, 2148, 2149.) The jury commissioner selected names from the telephone book by opening a page and picking out names at random. He stated that he had no systematic method of selection and that he paid no attention to names or nationalities. (Tr. 2139.)

(5) *A list of registered owners of automobiles in the Los Angeles area obtained from a friend, who in turn got that list from some company which prepared such lists for sale.* It was the understanding of the jury commissioner that the list was made up for insurance companies who wanted to solicit insurance from car owners. (Tr. 2122-3.) On May 7, 1945, a list of 1000 names secured from the said automobile list and the telephone directory was turned into the clerk. The commissioner did not know how many of the 1000 names came from each of the two sources. (Tr. 2145.)

(6) The names of 69 women were obtained from the *Congress of Parent and Teachers* on May 17, 1945.

Mr. Ivan H. Brown, the jury commissioner, held that office for approximately 16 years. Although he did not have available copies of lists turned over to the clerk of the Court prior to 1943, he testified that his method of selecting names during the period from 1943 to 1947 was typical for the entire period of 16 years. (Tr. 2159-60.) Certain other specific sources which have been used by the jury commissioner were mentioned by him. They were:

(1) *The Los Angeles Country Club, a golf and country club.* (Tr. 2126.)

(2) *The University Club.* (Tr. 2126.)

(3) *The California Club, a social club* in which manual workers, if any, were in the great minority. (Tr. 2126-7.)

(4) A very few names from the *Railroad Brotherhoods,* no names being obtained from any other unions. (Tr. 2130-1, 2161.)

(5) *Personal property assessment lists,* the jury commissioner not recalling the exact nature of the lists or how many names were obtained therefrom. (Tr. 2150.)

(6) A small list of *colored people* obtained from a colored minister whom the jury commissioner told he wanted a list of colored persons to serve on juries. (Tr. 2150-1.)

(7) A list of 24 names of *Japanese* obtained from a Japanese minister. (Tr. 2152, 2164.)

(8) A list of *tellers and employees of a bank.* (Tr. 2494.)

The jury commissioner testified that he never obtained a list from a Catholic priest in any area in which a large number of Mexican-Americans reside; that he doesn't know a Mexican or Negro organization from which he could get lists. (Tr. 2151-2.)

When it was pointed out that no Spanish, Mexican or Italian names appeared on the lists obtained from the telephone book, the jury commissioner said that he might have given consideration to the type of names at the time that he made his selection, but that he didn't do it consciously. (Tr. 2155.)

The names so selected by the jury commissioner, as well as a few names selected by the clerk of the Court, are used over and over again in the following way: Jurors who have served, or have been excused from service, have their names kept on cards in a file which now contains cards listing 25,000 to 30,000 persons. (Tr. 1996-7.) Only those who are disqualified for incompetency, for example for such a cause as deafness, do not have their names kept in the file. (Tr. 2026.) The files have accumulated since before 1925, with cards added each years since the inauguration of the system. (Tr. 2027-8.) Names are removed from this file only if it is discovered that the person has become incompetent, disqualified, has died or has moved away from the district, or in the event that the person is otherwise permanently excused. (Tr. 2028, 2034.)

From time to time the clerk of the Court sends out questionnaires to prospective jurors, obtaining the names of the persons to whom the questionnaires are

sent from two sources—some from original lists submitted by the jury commissioner. (Tr. 2041-3), and some selected at random from those of the 25,000 or 30,000 in the files who have not served during the past three to five years. (Tr. 1996-7.) There is no particular system with respect to the number of names selected from these two sources; the clerk merely takes some from each. (Tr. 2043.)

In 1944 or 1945, 5000 to 6000 questionnaires were sent out and about 1800 were returned. (Tr. 1998.) From 25% to 33⅓% of the questionnaires sent out are returned on the average. (Tr. 2114.) Nothing is done with respect to questionnaires which are not returned. Thus, the appearance of prospective jurors is rendered entirely dependent upon the voluntary act of the individuals involved. (Tr. 2102.)

When the questionnaires are returned, they are placed in alphabetical order and cards are typed therefrom. From these cards tickets are typed with just the name of the juror thereon, and said tickets are placed in the master jury box. Thereafter, names are drawn from the master jury box for various panels for both petit and grand juries. (Tr. 1968-9, 2053.) Whenever the number of names in the master jury box falls below 300, the matter is called to the attention of the senior judge who then orders additional names placed in the box. (Tr. 1980.)

The names for the grand jury panels are drawn from the master jury box twice a year, that is, a month before the commencement of each term. (Tr. 1970.) The panel for the grand jury which returned

the indictment herein was drawn in December 1945 and the jury was impanelled February 1946. In December, 50 names were drawn and typed on a venire, which was issued to the marshal and the persons were thus ordered to appear in Court. (Tr. 1970-1.)

The names from which the petit jury panel in this case were drawn were selected on January 2, 1947. At that time 855 names were placed in the master jury box from which names four jury panels were later drawn. (Tr. 1978-9.)[1] The first drawing of panels from the master box was on January 3 when two separate venires of petit juries and one grand jury were drawn. The trial jury in the instant case was selected from a panel or panels drawn later, but originating from the same 855 placed in the master box on January 2, 1947. (Tr. 1988.) There is no way of ascertaining how many of the 855 names came through original lists submitted by the jury commissioner and how many came from old records. (Tr. 2056.) Some indication of the division may be drawn from the following facts: In 1946 a petit jury of 293 persons contained 172 who had no previous jury service and 121 who had. However, the 172 undoubtedly included an undisclosed number drawn from the old files who had been excused and therefore had not previously served. (Tr. 2117.) The fact is that 50% or more of the jurors called for service are excused and their names go into the permanent records along with the names of those who serve.

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[1]Of the 855 names placed in the box, only 822 of the questionnaires were available. The other 33 were missing from the file. (Tr. 2025.)

When the prospective jurors appear in Court some are excused or found incompetent for service. Examples were given where out of 200 names drawn 70 were finally impanelled. (Tr. 1989.)

The practice hereinabove set forth has been in effect during the entire 16 years of service of the present jury commissioner, and before (Tr. 2097-8), except as follows:

1. Questionnaires were not used until 1943, following the conference of Senior Circuit Judges. (Tr. 1975.)

2. More names were drawn for panels during the war because there were a greater number of excuses. (Tr. 1974.)

3. The first names of women were placed in the box in the latter part of 1943 for the 1944 term. (Tr. 2030.)

Thus it appears that prospective jurors are selected, first, from lists submitted by the jury commissioner, which lists he obtained from the telephone book and certain special sources as above set forth, and, second, from a card file of names maintained continuously over a period of considerably more than twenty years, which names were obtained in the first instance from the lists submitted by the jury commissioner.

2. Expert testimony analyzing the composition of the juries and establishing the grossly unrepresentative character of the method of selection and of the results thereof.

The defense called as their principal witness Mr. William S. Robinson, an outstanding statistician in the field of social research, an assistant professor of sociology at the University of California of Los Angeles, with an M. A. in sociology and a Ph. D. in sociology and statistics. (For Mr. Robinson's qualifications, see Appendix DD, pp. 97-98.)

Dr. Robinson explained how a cross-section of the community, a "random sample" as it is called, is obtained for statistical purposes. The word "random," used herein, does not refer to selection without conscious bias; rather, it means picking mechanically so that there is no possibility of bias, conscious or unconscious. A sample selected by a random method is a group of cases or observations taken from a much larger group of cases or observations about which it is desired to know something. For example, Mr. Roper is able, by taking a random sample of 5000 persons, to predict accurately how the voting population of the United States, consisting of some forty million, will vote. A sample has to be selected so that it can make forecasts of that sort reliable, and in order to accomplish this the sample must be representative of the community. In picking a sample from a population the attempt is made to eliminate the human element. It is a fact that no one can make selections unless some mechanical means is adopted. The best of all accepted procedure is to use the table of random numbers, which is a table of digits which

have been checked in various ways to show that they are random already. Other ways, such as the proper throwing of dice, or mechanical selection of numbers are also acceptable. (Tr. 2182-6.)

The selection of samples or cross-sections by the random method does not result in exact cross-sections being obtained. As a matter of fact, the variation from an exact cross-section will vary from sample to sample. However, it is possible to set limits within which the variation will lie. These limits can be computed definitely and mathematically, provided that a true random method is used. (Tr. 2271-4.)

An example given by Dr. Robinson was one which assumed a drum containing a large number of marbles, 10% of which were white, and 90% black. These marbles are stirred very thoroughly and a sample of any specified number selected, without regard to their color. The proportion of white balls in the samples would not exceed 18% or fall below 2% more often than once in 100,000 times. This having been established, the following is obvious: If marbles are drawn from a drum containing an unknown quantity of white and black marbles, and 72% of the marbles are white, it is just not reasonable to conclude that the drum contains only 10% white marbles. In other words, ascertaining the character of a randomly selected sample, it is possible to determine, within limits, the character of the source from which it is drawn. In the instance where 72% of the marbles drawn are white, the number of white marbles in the drum might vary either 8% above or 8% below 72%,

but would not, as a matter of mathematics, vary beyond either of these two limits. The same principles can be applied to marbles, or squares, or human beings, or automobiles, or anything else. (Tr. 2274-8.)

It is thus that Dr. Robinson describes a cross-section of the community:

> "I mean a sample or a group of picked persons in which the proportions of the different occupations and, let's say, religious or everything else, should be represented, let's say, within random errors, or let's say adequately represented, in ordinary terminology. A miniature cross-section in which there may be some discrepancy between the picked group and the group from which it is supposed to be picked, but not glaring, consistent discrepancies, and particularly discrepancies which are persistent in regard to what a statistician would call Chi and which would tend to overemphasize one group and tend to underestimate another group over and over again." (Tr. 2422-3.)

In this connection, the inquiry was directed to Dr. Robinson as to how it was possible for 23 persons making up a grand jury to constitute a representative cross-section of the community. With respect to this, the witness said:

> "Obviously no 23 people can represent so many subcategories, the number of subcategories of different kinds of people which are involved in your lists, I suppose, in the millions, because if you give me nine divisions for religion, let's say, and four divisions for education—which you didn't give but which ought to be included—then that

means 36 subdivisions of both properties together. When you get through multiplying nine by four, by the number of categories in each of those major properties which you gave me, you would have a very large number. So it is obvious that 23 people can't be scattered over a million or two or three categories and fit into each one. What is required is not that they should represent but that they should be randomly selected from those categories, the millions, so that each person in each category shall have a chance of being included in any grand jury that is picked. So that the method of picking shall not exclude, shall not make it impossible, for a certain kind of person to get into the grand jury. That is all that is required." (Tr. 2428-9.)

The essential element in a representative cross-section, as described by Dr. Robinson, is as follows:

"To begin with, there is no question of picking, let's say, persons in terms of their specific properties, that is, the method I envision is a method of picking randomly from a total group. Now it may involve controls in that it may involve picking the right proportion of persons from, say, Burbank or other areas—it doesn't matter what they might be—but the essential element to it, which guarantees in the long run the representativeness and the statistics which guarantees the fairness of the sample, is that all persons living or eligible, let's say eligible for jury service, or all members of the population, however you want to define it, shall have a chance to be included, or let's say, that the sample shall be picked at random and that statistically at random

> using random numbers or some other device shall be picked from the total group.
>
> In other words, that there shall not be some pigeonholes with covers on the top into which you cannot reach to pick out cases. That is all. That will insure that there will be rich Catholics in the long run in the right proportion, and poor Catholics, many more of them because more Catholics are poor, in the right proportion, and every other possible combination of the millions of combinations of categories or properties in the right proportions." (Tr. 2430-1.)

If a person picks a sample and it is not like the population, that person is biased by reason either of his motives or of the method which he uses. There are no necessary ethical connotations to the bias. (Tr. 2221.)

The studies of the juries involved herein were made in the following manner: Where questionnaires were available, which was in practically all instances, occupational information was obtained directly from them. However, some of the questionnaires did not contain information concerning occupations, and on others the information was not clear. Where that occurred reference was had to the city directory, register of voters, and finally in few instances, if necessary, to personal phone calls to the person involved. From a scientific standpoint these methods are considered reliable for obtaining information. (Tr. 2234.) The only important groups of people for whom information was collected by telephone were housewives and

retired persons. Housewives and retired persons constitute a small percentage of the total involved; in any event, studies of the employed persons alone and of the total group including housewives and retired persons, leads to exactly the same results. (Tr. 2408-9.)

As a basis for comparing the occupational representativeness of the persons selected for possible jury service, the total population as shown by the 1940 census was used. The census classifications are based upon the Edwards Social Economic Grouping of Gainful Workers in the United States, as modified each decade when the census is taken. (Tr. 2227.) The classifications are broken down into a number of major headings, with most of the major headings containing subdivisions, each of which major headings and subdivisions thereof is based upon a definite economic and social status. Thus, the classification "farmer or farm manager", which is a major classification without any subdivision, indicates that the person is either the owner or manager of a farm. It does not indicate whether he runs a big farm or a little farm, but it does indicate that he is not a laborer,—if he were, he would be classified as a laborer. In those situations where a farmer also does laboring work, he would be classified according to his principal occupation. (Tr. 2257-8.)

The fact that different classifications of persons, as set forth in the census classifications, tend to have different economic and social views has been demonstrated by the fortune poll; as, for example, in

February 1944 a poll showing that 65% of professional and semi-professional workers and proprietors, managers and officials believed that labor unions had "gone far enough and ought to be curbed", whereas with respect to the balance of the population only 32 2/10% had this view. This is an example of people in the different economic classes having different social attitudes. (Tr. 2420-1.)

In the study that was made of the jury panels in this case, individuals were classified according to the detailed listings as to the individual classification and they were later grouped into broad classes, that is, the general basic classification utilized by the United States Census Bureau. (Tr. 2238.) One of the basic classifications is professional and semi-professional workers which includes such specific occupations as actors, architects, artists and art teachers, authors, editors and reporters, chemists, assayors, metallurgists, college presidents, professors, instructors and clergymen, and other occupations with the same general characteristics. Another major classification, farmers and farm managers, has already been mentioned. Proprietors, managers and officials include persons who own or have an interest in a business, as well as those who manage a business or a portion of a business, such as production managers, the manager of a firm or of an office, or anyone in a managerial position of authority controlling a large number of other employees. Officials included within this general classification are official representatives of corporations, conductors, postmasters, etc. The

next major classification, clerical, sales and kindred workers, in the main, is composed of clerks, sales people, canvassers and solicitors; in other words, of nonadministrative, nonprofessional, nonexecutive white collar workers. The major classification, craftsmen, foremen and kindred workers includes the actual workers and their foremen in such classifications as bakers, blacksmiths, boiler makers, machinists, locomotive firemen, welders, painters, etc. The major classifications, operators and kindred workers, are people who run machines, and apprentices, attendants at filling stations, parking lots and airports, brakemen and switchmen, chauffeurs, truck drivers and firemen, dressmakers and seamstresses, welders and flame-cutters, etc. Essentially, they are people who operate machines or equipment of some sort. (Tr. 2241-7.) The other major classifications are domestic service workers, protective service workers, service workers except protective and domestic, farm laborers and foremen, laborers except farm. Their characteristics are readily apparent in view of the foregoing. Also see Exhibits W-2, et seq.

Housewives and retired persons were tabulated and treated separately to begin with. In addition, housewives were classified according to the occupations of their husbands and retired persons were classified according to their last occupation prior to retirement. It is a scientifically established fact that there is a high correlation between the social and economic attitude of husbands and wives; likewise retired persons generally have the attitude represented by their last

occupation. For the purposes of occupational classification it is a perfectly good method, as research goes, to classify housewives and retired persons in the manner indicated. (Tr. 2248-50.) In any event, the distribution of housewives and retired persons in the occupational series was about the same as the distribution of employed persons; the variation from a representative cross-section did not change to any material degree either by the inclusion or exclusion of housewives and retired persons.

The use of the 1940 Census Bureau figures is proper in this case, because they are biased (in a scientific sense) for the present purpose in overemphasizing and showing to be more important today than they actually are professional and semiprofessional workers and proprietors, managers and officials, and in underestimating craftsmen and operatives in the main. In other words, their use could mislead only by being too conservative in showing the differences of distribution. The actual differences, that is, the actual variation from cross-section is greater than that shown by the study made in this case. (Tr. 2263-4.)

Insofar as the study made includes persons whose names were selected from the reserve file of 20,000 to 30,000 cards, it does show the general composition of those 25,000 to 30,000 cards because the random selection of several hundred cards from that box would give one a representative cross-section of the cards in the box. (Tr. 2265-6.)

It should also be noted that social, racial and religious classes are very highly correlated with occupational classes. For example, Catholics tend to be in the lower occupational classifications and Protestants in the higher. Likewise, if a sample has a disproportionately large number of high income people, it will have a disproportionately low number of Mexicans, Negroes and foreign born. (Tr. 2452-4.) Occupation is one of the best controlled factors, that is, as a statistical factor, in getting a representative sample. (Tr. 2348-50.)

For the purposes of his study, Dr. Robinson started out by assuming that the population of the county is of the same composition now as it was during the 1940 census an assumption most favorable to the prosecution. Next he accepted the census figures and classifications as a proper basis for determining percentages in various occupations, a procedure demonstrated scientifically to be a proper method of research. Then, he assumed, as a hypothesis to be tested, that each of the groups of jurors and prospective jurors had been drawn at random from a representative cross-section of that population. Finally, he computed the probabilities of getting the kind of a result that was actually attained in each instance and these probabilities turned out to be as a practical matter, nonexistent. The only possible explanation for the great departure from a representative cross-section is that the lists from which the names were selected randomly are not representative cross-section lists. (Tr. 2467-8.)

The following table gives the results of the study:

Exhibit and Page References	Panels and Juries Covered by Exhibits[1]	Probability of Selection for Employed Persons	Probability of Selection for All Persons Including Employe Housewives and Retired
Exhibit W-2, Tr. 2280-3, 2291	Grand Jury Panel February, 1946	1-500,000[2]	1-100,000,000
Exhibit X-2, Tr. 2296-9	Grand Jury Panel February, 1946	1-70,000,000	1-100,000,000
Exhibit Y-2, Tr. 2304	Grand Jury Panel September, 1946	[3]	[3]
Exhibit Z-2, Tr. 2309-10	Grand Jury Panel September, 1946	1-100,000,000	1-100,000,000
Exhibit AA-2, Tr. 2310-11	Petit Jurors September, 1946	$1\text{-}10^{69}$[4]	$1\text{-}10^{74}$
Exhibit BB, Tr. 2311-12	All 1946 Jurors	$2\text{-}10^{127}$	$2\text{-}\ 0^{127}$[5]
Exhibit CC-2, Tr. 2311-12	Grand Jury February, 1947	1-500,000	1-500,000
Exhibit DD-2, Tr. 2312-15	Grand Jury February, 1947	1-10	1-10[6]
Exhibit EE-2, Tr. 2315-16	Petit Jury February 3, 1947	1-50,000,000 to 100,000,000	1-50,000,000 to 100,000,000
Exhibit FF-2, Tr. 2316	Petit Jury February 17, 1947	1-50,000,000 to 100,000,000	1-50,000,000 to 100,000,000
Exhibit GG-2, Tr. 2316	Petit Jury February, 1947 Excused	1-50,000,000	1-50,000,000
Exhibit HH-2, Tr. 2316-17	Persons not drawn 1947[7]	$1\text{-}10^{100}$	$1\text{-}10^{100}$
Exhibit II, Tr. 2317	Overall summary for 1947	$1\text{-}10^{104}$	$1\text{-}10^{104}$

[1] It was possible to obtain information separately with respect to various panels and other groups selected for prospective jury service and the study was first made separately and then all of the groups were considered together.

[2] This is intended to indicate that if the names had been selected at random from a representative cross-section of the population, such a selection would have taken place only once in approximately 500,000 times. This is an immeasurably smaller probability than that of getting a Royal Flush. It cannot by any means be considered a representative sample. (Tr. 2291.)

[3] Due to an oversight, the witnesses did not give the probabilities here, but an examination of the exhibit will indicate that the probabilities appear to be in approximately the same proportion as X-2.

[4] This indicates that the probabilities are one in the number of times indicated by the figure 1 followed by 69 0's.

[5] The larger the sample the more improbable is the relatively large discrepancy.

[6] This is the only case in which it appears possible that the selection might have been from a representative cross-section.

[7] Not all of the 865 persons placed in the master jury wheel in 1947 had been drawn for service on any panel at the time of the hearing and this exhibit is for those who had not yet been drawn.

It is established by the foregoing that the panel jury and those names placed in the master jury box were not selected from anything approaching a representative cross-section of the community. (Tr. 2318-40.) This is not to say that there cannot be very many right or proper samples drawn from a cross-section. Such a sample is one which does not deviate from a given population more than a certain percentage. In other words, the variation is within certain limits which do result from chance even where the random method is used. Where the variation goes beyond these limits, the result must be attributed to something other than chance, and that something else is either a biased method or a biased application of the method of selection. (Tr. 2319-20.)

Dr. Robinson was asked to compare the probabilities here presented with that presented in the case of *Smith v. Texas,* 311 U. S. 122, 85 L. Ed. 84, in which case the Court said that the underrepresentation of Negroes could not be attributed solely to chance. In that case Negroes constituted 10% of the eligible population, white persons 90%.[1] Over a period of time 18 Negroes and 504 white persons were selected for possible jury service. Of this group 5 Negroes and 379 white persons were actually finally selected for service. The possibilities of this occurring are 8 in 1,000,000 or considerably greater than the probability in almost every example given above, and immeasurably greater than most of them. (Tr. 2321-2.)

[1]Under the laws of the State of Texas, only those persons who have paid their poll tax are eligible for jury service. (Article 339, Code of Civil Procedure, State of Texas.)

As a matter of fact, the actual probabilities are even less than those shown in the chart. Thus, for example, on Exhibit AA-2 there appear to be a total of 86 business men, managers and officials out of a total of 188 persons. Of the 86, 38 are engaged in finance, insurance and real estate. In making his computations Dr. Robinson did not take into consideration such factors as the incredibly large number of finance, insurance and real estate people within the major classification of business men; he considered only the distribution within the major classification. Had the disproportionate distribution within the subclassification been taken into account probabilities would have been considerably reduced. Incidentally, every one of the exhibits shows a large preponderance of the businessmen engaged in finance, insurance and real estate entirely disproportionate to their distribution in the population. (Tr. 2325-6.)

In every exhibit there is a tremendous overweighting of proprietors, managers and officials; there is an underweighting of the opposite types and there is an underweighting generally of craftsmen, domestic service workers and the lower classes in the economic and social scale. Laborers are underweighted almost perfectly—there are practically none of them. (Tr. 2326-7.)

The cause for the unrepresentative character of the panels and the juries need not be left to speculation. Each of the methods of obtaining prospective jurors militated against the possibility of obtaining a fair cross-section of the community.

1. Utilization of cards or records which had accumulated since a time prior to 1925 would have the effect of underweighting the lower classes on the scale;—that is, craftsmen, operatives, possibly service workers, and certainly laborers. It would do so for the reason that migration into the Los Angeles region, especially during the war years, was primarily in those classes so that they are proportionately better represented in the population now than they were in previous years. According to California Department of Labor statistics—manufacturing employment for Los Angeles in 1935 was 94,000; in 1946 it was 239,500. In 1935 these workers constituted 3.8% and in 1946, 6.9% of the total population; the proportion practically doubled. When the family group is considered, the 1935 proportion is about 10% as compared with about 20% in 1946. Furthermore, because business men generally tend to migrate from one city to another, much less than workingmen do, a much larger percentage of the workers than the business men listed in the record maintained since 1925 would have migrated, thus increasing the percentage of business men and decreasing the percentage of workers in these records. (Tr. 2327-31.) The foregoing does not take into consideration the unrepresentative character of the list in the first place.

2. The use of the telephone directory would create a probability of obtaining a representative cross-section of not more than one in several millions, or perhaps quadrillions, because the telephone book is statistically biased upward economically. The lower

economic class are extremely underrepresented in the telephone book. If consideration is given to the inability to get telephones in the Los Angeles area recently, it would make the tendency still more pronounced, because the migration into the area has been similarly of low income persons. (Tr. 2231-3, 2439.) The selection from the telephone book was made by the jury commissioner simply looking at names haphazardly and placing them on his list; as previously indicated, no such selection can be made in an unbiased manner regardless of the good intentions of the person involved. This probably accounts to some extent for the complete absence of Mexican, Italian and other such sounding names from the lists submitted by the jury commissioner.

3. A list of registered automobile owners which was believed to have been furnished to insurance companies would not give a representative selection from the community, it being biased upward economically to a greater extent than the telephone book itself. This is particularly true if the list was prepared for insurance brokers or companies, for the reason that insurance companies are particularly interested in owners of new automobiles. (Tr. 2341-2.)

4. The selection of a few names from the Railroad Brotherhood would not be representative of the community, although it would tend to some extent to correct the overwhelming bias in the other direction. (Tr. 2348.) Aside from the fact that the names obtained from the Railroad Brotherhood were very

few in number, the fact is that the method of selection generally employed would necessarily result in a great underrepresentation of union members. (Tr. 2418-19).

5. Certainly, lists from clubs such as the Friday Morning Club, the Ebell Club, the Los Angeles Country Club, and the California Club would be extremely biased upward economically and would not give a fair cross-section of the community. (Tr. 2366.)

6. Obviously Blue Books or social registers are biased upwards economically to a great extent. (Tr. 2367-86.)

7. The fact that only those persons who return questionnaires are even considered for a jury service tends to introduce a further bias in the method of selection. Tests have established that questionnaires are returned primarily from the group of proprietors, managers and officials, and to a somewhat lesser extent from clerical, sales and kindred persons. Craftsmen, foremen, domestic service people, operatives and protective service workers are greatly underrepresented in questionnaire returns. (Tr. 2391-2.)

8. It was pointed out that persons lower in the economic scale are more likely to be excused than others. Thus, for example, in the February 1946 grand jury panel there was one farmer who was called and served; there were eleven proprietors, managers and officials, of whom one-third were excused; there were eight clerical, sales and kindred workers, of whom three-eighths were excused; there

were four craftsmen, foremen and kindred workers, all of whom were excused; and there was one operative and kindred worker who likewise was excused. The record, however, shows that not all persons in lower classifications were excused at all times. The fact that the panels were unrepresentative in the first place with respect to the lower economic classifications made it even more improbable than it would otherwise have been that these groups would be fairly represented by the jury. (Tr. 2300-3.) The very fact that so many of these persons are excused would seem to render it more important, rather than less important, to have them properly represented on the panels, or the lists from which the panels are drawn.

It is an established scientific fact that representative samples cannot be obtained from telephone books, city directories, blue books, Who's Who, and a long list of similar documents. (Tr. 2368-9.)

At the conclusion of Dr. Robinson's direct testimony, the following questions were asked, and answers given:

> "Q. Now this last question, Doctor: At one stage of the proceedings you stated that you had never seen a group of sampling, or a selection, that was so far from a cross-section as the selection with which you were dealing here, that you were surprised at it.
>
> A. That is correct.
>
> Q. Now that you know the sources from which these questionnaires were obtained, the method of obtaining these persons, are you still surprised?

A. No, I am not surprised. In fact, it would be mathematically impossible to get a cross-section with that procedure." (Tr. 2403.)

3. Method of selection of jurors in the Superior Court of the State of California for the County of Los Angeles.

The Court on its own motion called Mr. Vernon W. Janney, the assistant secretary and assistant jury commissioner of the Los Angeles County Superior Court, as a witness. (Tr. 2190.) That Court is one of general jurisdiction of the State of California for matters over $2,000 and other matters. (Tr. 2191.) The method of selection of prospective jurors was described by the witness as follows:

> "We receive from the registrar of voters the entire voters' registration in the precinct sheets. We took each fifth precinct, in other words, we took 1, 6, 11, 16, and so forth.
> Then the precinct sheets that we selected, we took each ninth name, we checked each ninth name, and from the names that were checked we then mailed a letter directing them to report to the Secretary's office for examination." (Tr. 2191.)

For the jury list obtained on February 1, 1947, 33,000 letters were mailed out by that office. Those letters can be accounted for in the following manner: 2,760 returned as undelivered; 12,274 letters of correspondence, either asking to be excused or deferred, and actually deferred because the persons were doctors or lawyers or in poor health or at an age that would disqualify them, or women with children and no one to take care of the children; approximately

16,000 reported for interviews in response to the letters, of whom 9871 were excused at the desk; the balance were given questionnaires to determine their qualifications, as a result of which 2863 were excused and 3705 were approved for jury service. There were only 1527 letters unaccounted for, but experience shows that a good part of those would straggle in over the next several months. Ultimately, the office accounts for all but about 1% of the letters. (Tr. 2192-2208.)

The older the list used was, the greater the percentage of letters unaccounted for. (Tr. 2200.)

Although a list of registered voters would not represent a perfect cross-section of the community, Dr. Robinson testified:

> "But it is a well-known fact that among available lists for taking samples from population, the list of registered voters is more representative of, let's say, the total working population or the total labor force than is any other available list, such as a city directory or telephone book." (Tr. 2223.)

It is not a perfect source, but it is the best that is available.

Dr. Robinson also testified that the method used with regard to selecting the names from the precinct list was excellent and he could not possibly improve upon it. (Tr. 2224-5.) Using the registration lists and the method described by Mr. Janney, Dr. Robinson testified that the results obtained would fall within probability ranges of one in a hundred. (Tr.

2248-9.) It should be noted that the report of the administrative office of the United States Courts, in evidence as Exhibit 7, states that in New York the registry lists of voters had, at least prior to 1941, been the primary source of names for jurors.

A comparison of the registration lists with the sources used by the Court below reveals the following: Registration lists draw from approximately 1,800,000 names; the telephone book, the most complete source used by the jury commissioner, includes 562,000 names; the other lists used, of course, include very few names; the registration lists are the least biased economically. The telephone book is heavily biased economically, and the other sources are even more restricted and more biased. The registration lists are relatively current, never being more than four years old, while the sources used in the Court below include lists running back twenty-five years. In the Superior Court 90% or more of the letters sent out are accounted for, while in the Court below, not more than one-third of the letters sent out are accounted for. It is in the light of these facts that Dr. Robinson's testimony with respect to the undesirability of the method used by the District Court and the comparative great desirability of the method used in the Superior Court must be judged.

C. **THE LAW.**

1. **The scope and purpose of the review herein is established by virtue of the Appellate Court's power of supervision over the administration of justice in the trial Court.**

It is now established that the method of selection of jury panels and jurors by the District Court is subject to supervision on appeal as one aspect of the Appellate Court's power of supervision over the administration of justice by the trial Court. *Thiel v. Southern Pacific Co.,* 328 U. S. 217, 225, 90 L. Ed. 1181, 1187.

Referring to the *Thiel* case and other cases involving appeals from Federal District Courts, the Supreme Court in the case of *Fay v. New York,* 332 U.S. 261, 91 L. Ed. 2043, 2059, said:

> "These defendants rely heavily on arguments drawn from our decisions in *Glasser v. United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *Thiel v. Southern P. Co.,* 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 ALR 1412, and *Ballard v. United States,* 329 U. S. 187, ante, 195, 67 S. Ct. 261. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process."

Inasmuch as those matters which are embodied in the concept of due process must of necessity be included in any notions of good policy, the cases originating in both the State Courts and the Federal Courts are applicable here; the broadest rule to be drawn from these cases constitutes the measures to be applied to the selection of jurors in this case.

2. The defendants were entitled to an impartial jury drawn from a cross-section of the community.

The basic nature of the question presented here has been stated in the case of *Glasser v. United States,* 315 U. S. 60, 85, 86 L. Ed. 680, 707:

> "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial."

The expanding nature of this concept was emphasized by the Court: "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."

No hidebound approach can appropriately deal with such an issue. What may have received long and uncritical acceptance must now meet the challenge of the "basic concepts of a democratic society". If the system of jury panel selection falls short of this test, no indictment secured from a grand jury or conviction obtained from a trial jury chosen from such a panel may stand.

This growing concept of democracy has led the Courts infallibly to the principle that a jury must be a body truly representative of the community, and that as the representative of the community, it sits in judgment upon the defendant. The jury acquires the authority so to act not because its members are elected as representatives, but because they are selected from a cross-section of the community.

In case of *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84, in which a State Court's conviction was reversed because the trial jury was so selected as to deny the defendant equal protection of the law, the Court said:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

This rule was adopted in *Thiel v. So. Pacific Co.,* 328 U. S. 217, 90 L. Ed. 1181, wherein the Court went on to say:

> "This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class dis-

> tinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

"Intentional and systematic exclusion" which is condemned is not absent simply because there is a lack of purposeful discrimination. The requirement that there be no "intentional or systematic exclusion" places upon the trial Court an affirmative duty—to avoid discrimination. The means of accomplishing this end must be found by the Court. Thus the Court in the *Thiel* case, goes on to say:

> "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers."

In *Glasser v. United States,* 315 U. S. 86, 86 L. Ed. 707-8, the Court said:

> "The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. * * * If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

Here again is an indication of what is meant by "systematic and intentional." The "deliberate selection of jurors" from a particular source which selection necessarily results in discrimination is "sys-

tematic and intentional" regardless of the motive leading to the use of such a system. Precisely that which has been condemned in the cited case is to be found in this case. Jurors were deliberately selected from private membership organizations. Moreover, there is no distinction in principle or effect between the selection of jurors from a society club or from a society blue book, or from any other unrepresentative source.

The prospective jurors were selected not from a representative cross-section, but from highly selective and unrepresentative lists:

(1) The blue book, which is loaded with society people, business men, people with money, etc.; (2) society, women's clubs, university clubs, golf clubs, etc., which are similarly unrepresentative; (3) The telephone book, which is unrepresentative from an economic standpoint, because a large percentage of workers do not have telephones; (4) Lists of automobile owners prepared for insurance companies, which lists obviously name persons who generally purchase insurance, that is those in the higher income bracket and those who own relatively new automobiles; (5) Personal property lists which are biased against those who do not have personal property of sufficient value to require the payment of a tax; (6) 25,000 to 30,000 names which have been accumulated since prior to 1925, which lists were selected in the first place from the sources enumerated above which fail to reflect the expanding industrial character of the community and which do not take into account

the fact that workers tend to migrate more than business men.[1]

In the case of *Fay v. New York,* supra, the Court pointed to the unreliability of four year old census figures when used to determine whether a jury constituted a representative cross-section of the community; how can it be denied, then, that lists of names more than twenty years old cannot be used to select a representative cross-section of the community.

It is true that a few names were selected from the membership of Railroad Brotherhood Unions, a few from among bank employees, and there were a few Negroes, Japanese and Chinese named. The total of all these constituting a tiny percentage of all the names used, may have tended in some completely unsubstantial degree to correct the unrepresentative character of the lists. The fact remains that in excess of 99% of the names were selected from sources which were unrepresentative of the community and biased upward economically.

Taken in their entirety the sources for jurors are such as to render the jury obtained therefrom "the organ of a special class," obviously a class different from that of defendants, who are manual workers in a low economic status and who are all members of a labor organization—the C.I.O. Despite the fact that

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[1]Supplementing the testimony of Dr. Robinson concerning the unrepresentative nature of telephone books and records of the Railroad Commission show that in 1920 and 1930 a much smaller percentage of persons had phones than now. Therefore, the use of telephone books in past years constituted an even more unrepresentative method of selection than it does at present.

a few workers are found in the lists utilized for jury selection, the inevitable effect of the method of obtaining names is that professionals, business men and executives are in overwhelming preponderance both absolutely and with respect to their proportionate number in the community. Such juries are as surely the organs of special classes as though no workers at all were on the lists. The lack of representativeness differs only in degree and continues so great that its undemocratic and special character is not essentially diminished.

While the trial Court does have the task of securing competent jurors, that task is subordinate to the requirement that a represenative jury be obtained. In the case of *Glasser v. United States,* 86 L. Ed. 680, 707, 315 U. S. 60, 85-6, the Court says:

> "This duty of selection may not be delegated. *United States v. Murphy* (DC) 224 F. 554; *Re Special Grand Jury* (DC) 50 F. (2d) 973. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."

Of course, the difficulty of getting completely representative lists must be recognized. It might be urged that because of such difficulty, the use of the telephone book was proper. However, if this were conceded, it would seem to follow that the telephone book should be supplemented by lists designed to overcome the unrepresentative character of that book. Here, however, the exact opposite was done. The telephone book, already biased upward economically, was supplemented almost exclusively by lists which are even more biased economically in the same direction. It would have been one thing to utilize the telephone book supplemented by lists of members of A. F. of L., C.I.O., Railroad Brotherhood and independent unions, and by lists obtained from organizations of Negroes, Mexican-Americans and similar groups. It is quite another matter, however, to supplement the telephone book by the blue book lists from society clubs, etc. In one instance, the obtaining of a fairly representative cross-section might be possible; in the other, it is simply impossible.

By far the best method that was pointed out during the course of the testimony was that used in the Superior Court of the State of California in which there was a random selection from the voters' register. It is true that this register includes only about 70% of those eligible for jury service. However, it has each of the following advantages:

1. It contains more eligible names than any other list—about three times as many as the telephone book, for example.

2. It does not discriminate against persons because of their economic status, in that it does not require any payment of money to register.

3. It does not require that an individual belong to a particular club, own a new automobile, have a sufficient amount of personal property to be taxed, or even have enough money to have a telephone.

There may be many methods of jury selection which may properly be used. What is required in any event is that the system comport with "the concept of the jury as a cross-section of the community."

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." *Glasser v. United States,* 315 U. S. 60, 86 L. Ed. 680.

Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84, 86:

> "The state argues that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted that they did not select any negroes, although the subject was discussed, but both categorically denied that they inten-

> tionally, arbitrarily or systematically discriminated against negro jurors as such. * * * But even if their testimony were given the greatest possible effect * * * we would still feel compelled to reverse the decision below. *What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously, or ingenuously, the conviction cannot stand."* (Emphasis ours.)

Thus it is not necessary that there be a purposeful exclusion; the intentional use of a system of selection, such as that involved here, which results in discrimination is included within the framework of the phrase "systematic and intentional exclusion."

3. Systematic and intentional discrimination can be established through proof either that the method of selection would necessarily result in discrimination, or that the selections could not have resulted from a system of selection designed to secure a representative cross-section of the community.

In the case of *Thiel v. Southern Pacific,* 328 U. S. 217, 90 L. Ed. 1181, the Court clerk testified that in making his selections for jury service he did not include persons who worked for a daily wage. It was thus established that a system was used which would necessarily result in discrimination. However, it does not follow that this is the only way to prove discrimination. The absence or gross underrepresenta-

tion of any major economic, religious or racial group would lead to the same conclusion.

In *Smith v. Texas* (supra), somewhat over 10% of the population eligible for jury service consisted of Negroes. Utilizing the 10% figure and assuming that all Negroes were qualified to vote (and the *Smith* case indicates to the contrary), then if the Negroes had been proportionately represented in accordance with their numbers in the eligible population, there would have been approximately 50 instead of 18 Negroes on the panel and approximately 40 instead of 5 would have served.

In the face of uncontradicted testimony to the effect that there was no intent to discriminate against Negroes, the Court held that because the discrimination could not be accounted for by chance alone, there was sufficient proof to invalidate the grand jury proceedings.

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

In both the cases of *Thiel v. Southern Pacific* (supra) and *Smith v. Texas* (supra), motives were held immaterial where there was the intentional use of a system which resulted in discrimination. In neither case was there any direct evidence of any desire to discriminate against any particular group or class of persons. In the *Thiel* case the fact that discrimination was the inevitable result of the

system used was sufficient proof of "intentional and systematic exclusion." In the *Smith* case, it was established by the fact that the variation from a representative cross-section was such that it could not be accounted for by chance alone. Basically, the only distinction between the two cases on this point is the method of proof.

The question here is whether there has been the intentional use of a system which resulted in discrimination against workers and persons in lower economic categories. Such intentional use constitutes "systematic and intentional exclusion" within the meaning of the cases. The determination of that question of fact may be made upon the basis of the results of the system used, as well as by the examination which has been made of the system itself. Here the occupational distribution of the jurors selected for prospective service is such that the discriminatory nature of the method used for their selection is clearly established.

It might be well to consider, at this point, the nature of the data used in the study made in the Court below. In the case of *Fay v. New York,* 332 U.S. 261, 91 L. E. 2043, a census classification comparison similar to that utilized here was presented in the lower Court. The Supreme Court in that case found that discrimination was not established by the use of census data for a number of reasons:

1. There was a five-year discrepancy in the dates of the data used. Here too there is a discrepancy be-

tween the date of the census figures and the selection of the juries involved. However, as has been established by expert testimony, because of the change in the character of the population, the effect of that discrepancy has been favorable to the prosecution rather than otherwise; this is so because persons in the lower economic groups, those who have been least well represented on the juries, have increased proportionately in the population during that five-year period.

2. The Court held that the conclusion that discrimination existed would be justified "only if we knew whether the application of the proper jury standards would affect all occupations alike, of which there is no evidence and which we regard as improbable". In that opinion, great emphasis is placed upon the character of the population of the City of New York, as containing a large number of noncitizens and a large number of persons who cannot read and write English, etc. That situation does not exist in the Los Angeles area. Furthermore, in this case the study includes all of those persons who were ever considered for jury service—that is, it includes those who were excused because they were not qualified. Lack of qualification among those in the lower economic brackets, therefore, cannot explain in this case the tremendous underrepresentation of persons in such classifications. Finally, on this point, an expert witness testified that the selection made could not be reconciled with the use of a proper method of jury selection. There was no such testimony in the *Fay* case.

3. In the *Fay* case the challenge was directed against a special panel which was drawn from a general panel, and no comparison was made between the general panel and the special panel, nor was there any complaint that the general panel had not been drawn properly from the overall population. In addition to those disqualified or exempted from general service, persons were eliminated from service on the general panel by certain special tests. Each such test had a direct relationship to qualifications for jury service. "The uncontradicted evidence is that no person was excluded because of his organization or economic status."

Thus the real holding of the *Fay* case is that, the issue being limited to whether there was proper selection from the general jury panel, only that selection is material and the evidence established neither that it was in essence discriminatory or that it resulted in discrimination.

Here the challenge was directed to the original drawing or selection of the jurors from the general population. The occupational characteristics of the persons were tested at every stage of the selection proceedings and the study made included persons who actually served on a jury, those who were placed on jury panels, those who were excused or disqualified from service and even those who had not yet been subpoenaed to appear in Court to determine whether they should be placed on panels. Here the overall comparison was the population conclusively established the discriminatory nature of the selection.

4. In the *Fay* case a question appears to have been raised concerning the reliability of the classification system used as a means of determining what constitutes a representative cross-section of the community. It will be noted that two tables are referred to, only one of which uses the major census classifications. The remarks of the Court concerning the reliability of the method of classification were apparently directed to the other table.

In any event, here, as was not done in the *Fay* case, uncontradicted expert testimony was presented to the effect that the census classifications reflect social and economic status, particularly with regard to employment relations. The expert also testified that persons in the different classifications tend to have different economic and social views. This expert segregated the jurors into the groups reflecting such different views and among those groups there appeared the grossest kind of discrimination.

5. Finally, on this point, the Court in the *Fay* case said:

> "On the other hand, the evidence that there has been no discrimination as to occupation in selection of the panel, while from interested witnesses, whose duty it was to administer the law, is clear and positive and is neither contradicted nor improbable. The testimony of those in charge of the selection, offered by the defendants themselves, is that without occupational discrimination they applied the standards of the statute to all whom they examined. We are unable to find that this evidence is untrue."

Here it is not necessary to find the testimony of the Jury Commissioner and of the Court Clerk untrue in order to explain the discrimination. As a matter of fact, their very testimony as to the method of selection constitutes a full explanation. On the one hand the claim that the system used was discriminatory was corroborated by the results of the selection as shown by comparison with the census figures; on the other hand, the fact that the results as shown by the census figures proved discrimination was corroborated by the discriminatory nature of the system used.

The complete impossibility of results such as those which were found in this case being achieved through the use of a proper system is clearly demonstrated by the testimony of Dr. Robinson. It might be well to note, however, that the Grand Jury which returned the indictment had on it two professional persons, fourteen proprietors, managers and officials, and five clerical, sales and kindred workers. There were no craftsmen, no operatives, no laborers, no domestic workers—none of the persons on the jury were in the lower occupational classifications. As shown by the census, the occupational group from which all of the jurors were drawn constitutes less than one-half of the total working force. From that portion of the population constituting more than one-half of the working force at the lower end of the economic scale, no jurors at all were selected. It should require no citation of statistics to establish that among those economically best off, particularly among professionals, among proprietors, managers and officials, and even among white collar workers, trade union

members are fewer than in the lower economic bracket. Even this does not tell us the entire story. On this Grand Jury, professionals and clerks were represented in just about the proper proportion. Business men, however, were overrepresented at the ratio of five to one.

On the Grand Jury panel there were seven professionals, twenty-one proprietors, managers and officials, four craftsmen, and one operative. Thus, although there are fewer proprietors, managers and officials than craftsmen in the population, the proprietors were represented better than five to one on the jury panel as compared with craftsmen. There are about one and one-half times as many operatives as proprietors in the population; yet the proprietors were represented at about the rate of twenty to one. There are a few less service workers than proprietors, but there are twenty-one proprietors and no service workers. There are one-third as many laborers as proprietors, but there are twenty-one proprietors and no laborers. From the lower half of the population, economically speaking, came less than 10% of the entire panel; from the upper half, came the other 90%. It would require more space than is warranted to examine each of the exhibits separately. However, the exhibits will reveal the amazing consistency of the over-representation of proprietors, managers and officials, and of the under-representatiton of workers.

It will be remembered that in the case of *Thiel v. Southern Pacific,* 328 U. S. 217, 90 L. Ed. 1181, supra, the wives of workers appeared to be adequately repre-

sented on the panel. This fact was stressed in the dissenting opinion by Mr. Justice Frankfurter who pointed to it as an indication that there was no purposeful discrimination. In that respect this case is even clearer than the *Thiel* case; here wives of workers, as well as retired workers, are underrepresented to the same extent as the workers themselves.

Such statistics can only mean that the jury officials utilized a system for selection of jurors other than one consistent with the obtaining of a representative cross-section of the community. It is obvious that the defect in the system is of an economic and social nature, completely unjustified by the democratic principles of the jury system.

The case of *Fay v. New York,* 332 U.S. 261, 91 L. Ed. 2043, 2059, recognizes the principle that the method of organization of a jury may be deduced from the results of such organization. Speaking of the high ratio of convictions previously noted therein with respect to special juries as compared with regular juries, the Court said:

> "But a ratio of conviction so disparate, if it continued until 1945, might, in the absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict."

Here just such a disparate ratio exists with respect to the distribution of occupational classifications in the community on the one hand as compared on the other with persons selected for possibly jury service.

It is not necessary to rely upon a lack of explanation here to reach the conclusion that this result is attributable to the system used in selecting persons for jury service; an examination of the very system affords that explanation and confirms the conclusion reached from an examination of the results of that selection.

SUMMARY.

The defendants were entitled to an impartial grand jury and to an impartial trial jury. This does not mean simply a group of individuals each of whom individually meet the test of impartiality to the extent that he may escape a challenge for cause in a particular case. Among thinking men, complete impartiality on any subject can seldom, if ever, be found. The only way that it is possible to get an impartial jury is through its selection from a cross-section of the community, so that the final jury is composed of twelve individuals who within their own classifications and within their own limitations are individually impartial, but who when taken together are representative of a community.

Such a cross-section can be obtained through a method deliberately devised to achieve it. For example, the jury commissioner and the clerk can see to it that various major occupational classifications, and the various racial and religious groups are represented on the jury panels approximately in their proportion in the community. On the other hand, it

can be obtained by using a method reasonably designed to achieve a cross-section, such as the utilization of the voters' register and the random selection of names therefrom, so that any variation from a cross-section of the community is a result of chance, and chance alone. What is forbidden is the utilization of a system which necessarily leads to discrimination in favor of one class or group and against another.

Almost thirty years ago a United States District Court judge, in the case of *United States v. Standard Oil Co.,* 170 Fed. 988, 994, analyzed the basic principles involved here. He said:

> "As I said this morning, a man is entitled to a fair trial. This defendant is a corporation, but the same rules apply. A defendant is entitled to a fair and impartial trial. Now, without reference to how this comes to be or without reference to the way it came about, and without suggesting in any way that any one is to blame for it, yet here is a case of wide public interest, and everybody has probably some view on the matter. It has been much discussed, and it involves problems in regard to the transportation of commerce in a large way. Without going into the matter very far, we know that there are certain views taken on some subjects in the city, and other views are taken in the country, whether right or wrong. The views of the people who live in large communities and do business in a large way and on a large scale do not always harmonize with the views of people who live in smaller places and do business on a smaller scale. I am not now saying

which set of people are nearer right. It is not for me to say.

Without any reference to how it happened, it so happened that this case is tried in a district that is composed, as I have said of this enormous commercial city and the small rural towns outside. The air may be much purer out there than it is here. The moral standards may not only be different, but they may be better; I do not know; it is not for me to say. The degree of intelligence outside may be equal to the intelligence in the city, and that is not for me to say. But what is a jury? The jury is a jury of men, a jury of a man's peers. What is the verdict of the jury that we are after? It is the average judgment of 12 men, not the judgment of 12 carpenters, 12 farmers, 12 bankers, or 12 professional men, but the average judgment, I might say, of average men. It so happens that this venire drawn here today, or this panel, or whatever you may call it, is composed of men, I assume, beyond reproach in character and standing and capacity, but they are all with the exception of three, outside of this great commercial city, which is a large part, a major part, of this district so far as population, business, and wealth are concerned, and it so happens, by reason of that fact, that a large proportion of these men are farmers. As I said this morning, I think mighty well of the farmer as a juror. I have seen him tried for a long time. I don't think the farmer is any better than other people in some respects, but as a rule he is a good juror; and I think there are questions in this case which farmers may be thoroughly qualified as jurors to try. Yet the probabilities are

> that if the jury were composed partly of business men that a more satisfactory conclusion might be reached, or if not a more satisfactory conclusion, yet the conclusion would be accepted more satisfactorily."

In the instant case, the defendants were members of a C.I.O. union. They engaged in and claimed the right to engage in activities common to labor unions. That workers generally tend to take a more favorable view to such activities than do businessmen is hardly subject to doubt. Defendants were entitled to a jury in which the predilictions of businessmen were not predominant, they were entitled to a jury in which the attitude toward their activities was generally representative of the community attitude on these matters. Jury panels selected from sources biased upward economically and, as a result, made up primarily of businessmen and professionals with a corresponding underrepresentation of workingmen is not a basis for the selection of such a jury.

We are dealing here with a fundamental right, one which goes to the very substance of our jury system. Consideration neither of expediency nor convenience should give way to implementing, expanding and strengthening that system in accordance with the developing processes of the law. The recognition that juries must be selected from an impartial cross-section of the population is a comparatively recent one in the law and is to be welcomed as furnishing added vitality to our overall democratic process. It

gives renewed life, vigor and meaning to the right of trial by jury.

The questions presented here must be decided in the light of the broad social issues involved. The existence of an unfair system of jury selection injures these defendants, but what is more important it undermines the jury system itself. As is stated in the case of *Ballard v. United States,* 91 L. Ed. Adv. Op. 195, 199:

> "This injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

What is at stake here is not alone the rights of these defendants, but, what is even more important, the proper functioning of the jury system itself. An examination of other cases reveals none in which there was presented so complete a record or one including an expert sociological and statistical analysis. If there is merit to defendants' contentions, and it is submitted that there is, the evil which has been demonstrated to exist should be struck down now. If that is not done, the discriminatory practice will be allowed to continue unabated and an opportunity to eliminate practices damaging to the administration of justice will be lost.

The motion to dismiss and the motion to quash the trial jury panel should have been granted. The denial of these motions was error and on these grounds this case should be reversed.

We respectfully submit that the judgment of the trial Court should be reversed.

Dated, San Francisco,
May 15, 1948.

Gladstein, Andersen, Resner & Sawyer,
Gallagher, Margolis, McTernan & Tyre,
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(Appendices Follow.)

Appendices.

Appendix A

"§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between

factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693."

Appendix B

Sixty per cent or more of the members of Local 36 do not own any interest in a fishing boat. They merely work in the industry on boats owned by others. (Kibre, Tr. p. 1355.)

Approximately 450 small boats fish out of San Pedro harbor. Local 36 has members on approximately 175 out of the 450 boats. However, these 175 boats are not manned entirely by members of the Local. (Zafran, Tr. pp. 1616-17.)

Of the defendants, the following have never owned a fishing boat: Kennison, who lives in a trailer, and who supplements his income by engaging in casual labor, such as washing the bottom of a boat or painting the bottom of a boat (Kennison, Tr. p. 1445); Kibre, who is secretary-treasurer of the international organization of which Local 36 is affiliated; Zafran, who never owned a boat and who, when he developed ulcers, became the business agent of the Local (Zafran, Tr. p. 1514); McLauchlan, who is now a bee-keeper (McLauchlan, Tr. pp. 1609-10); and McKittrick. (Tr. pp. 1748-49.)

The other defendants have all owned a fishing boat at one time or another. Defendant Sawyer purchased a boat in 1945 at a total cost of $4400.00. He owned it for a little over a year during which period he used it about a third of the time. The other two-thirds of the time he spent either repairing the engine on his boat or fishing on other boats. He sold his boat in the spring of 1946. (Sawyer, Tr. 1455-6.) The

appellant Smith together with a partner purchased a boat in 1935 at a total cost of $2,000.00. His boat was financed in its entirety by the Coast Fishing Company of Wilmington. (Smith, Tr. 1471.) The appellant Knowlton purchased a boat in 1922 for $250.00. He sold that boat and later, together with a partner, bought another boat for $800.00. The second boat was blown up, and about a year and a half later he bought a third boat at an original cost of $3,000.00, making a down payment of $1,000.00 and thereafter making annual payments. At the end of six years, interest and insurance had accumulated to a total of $3,400.00, so he turned the boat over to the Van Camp Cannery, which had financed the purchase in the first place. In 1936, this appellant purchased another boat for $2,500.00 (the boat shown in the motion picture, Exhibit BB), which he owned at the time of trial. An objection to the question as to how much he still owed on the boat was sustained by the Court. (Tr. pp. 1580-3.)

The appellant McComas purchased a boat in 1942, for which he paid $1,000.00. Thereafter in 1944, he sold that boat and purchased a smaller one. The original boat was operated with a crew of two including the appellant, whereas the second boat was generally operated by the appellant only. (Tr. pp. 1596-7.)

The appellant Munson purchased a boat in 1934 for which he paid $640.00, $300.00 down and $50.00 a month. In 1942 he sold that boat and in 1945, he and his wife together built a fishing boat which he

and his wife thereafter operated. (Munson, Tr. pp. 1694-6.)

The appellant Phelps lives on a fishing boat and has no other home. He supplements his fishing income by occasionally doing a bit of engine work on other boats. He purchased a boat in 1934 for the sum of $350.00. At the end of one year, he sold it for the same amount, and went to sea as a marine engineer. In a short time he came back and then went fishing again, working on boats owned by other persons. In 1940 this appellant bought a second boat for which he paid $650.00. At the end of four months, he sold that and has not owned a boat since. At the time of trial, his fishing property consisted of three fish traps. (Phelps, Tr. pp. 1603-6.)

The appellant Lackyard, who was a housepainter before he started fishing, acquired a boat in 1943 for which he paid $450.00, and which boat he owned at the time of trial. (Tr. pp. 1697-8.) During the time that he has owned that boat, he has fished on other boats as well as his own. (Tr. 1700.) In 1936, appellant Hill obtained an old hull which had been discarded, put in an automobile motor and built his own boat at a total cost of about $500.00. He sold his boat in 1942 for $450.00, at which time he bought a second boat, for which he paid $1,000.00, and which boat he still owns. This appellant also worked on other boats during the period that he owned his boat because there were times when the only kind of fish which was available was fish for which only larger boats had the necessary equipment and facilities. (Hill, Tr. pp. 1703-6.)

Appendix C

Thus, one Government witness familiar with the records of dealers, which records were required to be kept by law, testified to this effect. (Sander, Tr. pp. 805, 819.) Records were introduced as one example. (Ex. E & F, Ross, Tr. pp. 256-7.) Various defendants testified that the practice of fishermen was to favor specific dealers in the sale of fish because by this method, they obtained some assurance that when there were large quantities of fish, they would be able to sell it. When a fisherman brings in a load of fish, he goes to a dealer, finds out what price the dealer is going to pay, and then proceeds to fill the order at that price. If he has more fish than any one dealer wants, he will sell the rest to another dealer or dealers, receiving the same price per pound of fish from each of the dealers. As one fisherman testified, he does not discuss the price with the buyer. "He makes out the ticket, and I take whatever he puts down on the ticket". (McComas, Tr. p. 1599.)

Appendix D

One Government witness testified that it was a general practice for fishermen to borrow money during the wintertime from one of the dealers or from other sources, and that he personally kept owing and paying one dealer back all of the time. (Souder, Tr. pp. 813-15.) One of the defendants also testified to this common practice to borrow money from the dealers, stating that when money is borrowed there is a verbal agreement for preference in delivery of fish to be given to such dealers. (Smith, Tr. pp. 1475-6.) In addition, dealers finance boats and gear and rent nets, the fishermen involved delivering their catch to the dealer during the financing or the renting. (Naylor, Tr. pp. 931-2.)

In addition, some of the dealers own an interest in boats, and permit fishermen to use them on a share basis. Such dealers can at any time remove the fishermen from the boat, either lay it up or let other fishermen use it. Fishermen on these boats deliver all of their catch or give a preference to the dealer having an interest in the boat. (Vitalich, Tr. pp. 349-51, DiMassa, Tr. pp. 419-24, Bregante, Tr. pp. 516-17, Naylor, Tr. pp. 851, 860-1, 905-6, 925.)

Appendix E

As has been previously pointed out, there are two types of fishing boat fleet on the West Coast—the small boats and the large boats. In the San Pedro area, the two were first organized together in 1934 in an organization known as the Fishermen and Cannery Workers International Union.

As the defendant Kibre testified:

> "The Union was organized around the question of getting a minimum price contract for sardines, tuna and mackerel delivered to the canneries. That was actually the objective that led to the organization of the union. And their first step was an attempt to secure from the canneries such a contract." (Tr. p. 1169.)

At the time of the organization of the fishermen in 1934, they engaged in a strike in order to obtain a contract. (Kibre, Tr. p. 1172.) About the same time the Alaska and Puget Sound fishermen organized in two separate organizations. (Kibre, Tr. p. 1173.)

In 1936 the existing organizations of fishermen on the West Coast formed the Federated Fishermens Council and within a few months after its organization, it applied to the Committee for Industrial Organizations—as it was known at that time—for a charter, which was granted late in 1937 and the organization then became known as the International Fishermen and Allied Workers, the international organization with which Local 36 is affiliated. The new international began its operation in 1938.

The organization of small boat and large boat fishermen of the San Pedro area became local 33 of the new international. Before 1943, the small boats in Newport Beach, where there were no large boats, were organized in Local 36 of the international in 1943, Judge McCulloch of the Federal District Court of Oregon, handed down a decision in a case in which fishermen seeking minimum price agreements were charged with violation of the Anti-Trust laws. He held that the fishermen were properly operating as a marketing organization. As a result of this decision, the convention of the International Union in December of 1933 called for the promotion and stimulation of group bargaining on the part of small boat fishermen.

As a consequence of that decision, the union embarked on a program of developing group bargaining among small boat fishermen, particularly those engaged in the delivery of fresh market fish. As a result of this organizing drive, small boat fishermen were organized in most of the ports of Southern California and in 1944 the Newport local—Local 36—was reorganized to include all small boat fishermen in the Southern California area. (Kibre, Tr. pp. 1183-6, 1406-7.)

In 1938 a strike among fishermen was conducted in Southern California which lasted for several months. During the same period in Northern California, the catch has increased about five times, and there has been a steady upward trend. (Kibre, Tr. pp. 1229-30.)

Appendix F

Local 36 and its representatives insisted again and again from the very outset of the controversy that the principal thing that they were interested in was that a fisherman should know what price he was going to receive for his catch before he went out to fish. (Ross, Tr. p. 193.) The dealers took the position that they could sign no such agreement as it was submitted, because they were under the compulsion of a cease and desist order issued by the Federal Trade Commission, sometime between the years 1938 to about 1940. (Ross, Tr. p. 117.) The position of Local 36 was that the order referred to dealt with the situation where the dealers had gotten together themselves for the purpose of buying fish at a definite price set by them for the fishermen and by selling fish at a definite price which they set for their customers, whereas, the agreement proposed by the fishermen was one between the producers of fish, those who performed the labor necessary to catch the fish, and the wholesaler, and that the anti-trust act was not intended to apply to such a situation, but that the Fishermen's Marketing Act and the Clayton Act were intended to apply. (Zafran, Tr. pp. 1525-9.) The dealers persisted in their position and stated that they wanted to get a Government ruling which they had been unable to get up to that time and that perhaps the only way to get such a ruling was for the fishermen to proceed with their strike. Accordingly, on May 27, 1946, Local 36 sent a letter to the fresh fish dealers advis-

ing them that unless a minimum price agreement was signed by the next day, that the strike would be begun. The letter went on to state: "The purpose of this decision was to expedite matters and get a decision from the government agencies in reference to the legality of signing a minimum price agreement." The quoted paragraph was in response to the suggestion of the dealers that if the strike was called, the government agencies might move in and give an opinion about the legality of the agreement. (Govt. Ex. 236, Zafran, Tr. pp. 1531-2.)

The defendant Jeff Kibre had been in the East at the time that the strike started. Immediately upon his return on June 10, 1947, a meeting with the dealers was called. Defendant Kibre informed the dealers on behalf of Local 36 that he was very anxious to see if an immediate settlement of the difficulties could be arrived at. He stated that the primary concern of the Union and of himself as a responsible officer of the International was precisely the question of a marketing program and that he was sure that the strike could be ended as soon as the dealers showed evidence that they were negotiating in good faith. The attorney for the dealers stated that he had advised his clients that he did not see how they could possibly enter into an agreement with the fishermen to fix the prices of fish and that any such agreement would be a violation of the Sherman Act. The defendant Kibre replied that he had made some study out of sheer necessity of the Fishermen's Marketing Act and that he had read Judge McCulloch's deci-

sion of January, 1944, which held that the contract between the Columbia River affiliate and the Columbia River Packers Association was not in violation of the Sherman Act and that the situation in San Pedro was absolutely identical with the situation on the Columbia River. He pointed out that Judge McCulloch had held that the Union could be treated as a co-operative for the purposes of the Fishermen's Marketing Act, and that therefore group bargaining for minimum price contracts between the fishermen's union, representing the fishermen and the dealers was not in violation of the Sherman Act. The defendant Kibre further pointed out that there was a question about the validity of a closed shop provision and that this question was pending in the San Francisco District Court, in a declaratory relief proceeding, but that no question concerning a closed shop was involved in the negotiations at that time because the Union was not asking for any such provision. The defendant Kibre also pointed out that the War Labor Board had ruled that the prices paid to fishermen constituted wages or could be treated as wages and that it would set such prices because they were wages. At that meeting the dealers stated that there was no question concerning the reasonableness of the Union's demand and that the prices proposed were very reasonable. The dealers stated that they recognized the fishermen had been faced with steadily rising costs of operation and that they were entitled to a price such as the O.P.A. had set. The defendant Kibre then went on to say (Tr. p. 1329):

"It is not a matter of signing a particular contract that we should be concerned with, but what we are interested in is trying to work out some form of agreement here which will give the fishermen some measure of security so that they will know what they are going to get when they go out to make their catches, and that we felt that such a measure of security was indispensable to the bringing about of a sound relationship of the fishermen and the dealers in this area so that we could then go ahead on a full-fledged marketing campaign."

As a result of that meeting, a small committee was created to meet the following morning in the office of the attorney for the dealers. At that time a suggestion which had previously been made by the attorney for the Union was again considered and an agreement was worked out in accordance with the suggestion, providing for the establishment of prices on a trip-by-trip basis. The attorneys for the Union and the dealers jointly dictated a proposed exchange of letters which provided for a termination of the strike and for a temporary arrangement for the sale of fish. This agreement stated that both parties had recognized that the existing situation where fishermen go out to fish without having any advance assurance as to the price to be paid is the basic cause of the dispute and that means should be found to end this situation. The Union therefore proposed, and the dealers accepted in their reply letter, that prior to the departure of a fishing vessel, the anticipated catch of the vessel shall be offered to a fish dealer at

a fixed price, that the individual fish dealer shall be at liberty to accept or reject this price, or to arrive at another price by negotiation on the spot, and upon agreement the vessel will depart for fishing and upon return the load of fish will then be distributed to the dealers who have agreed in advance to accept the fish at the stated price for that particular trip. (Defs. Exs. A and B.) The attorneys and the parties agreed that this proposed contract could not possibly constitute a violation of the Sherman Anti-Trust Law. Meetings were immediately held by the various subdivisions of the Union and the proposed agreement was accepted, with the recognition on the part of the Union that it constituted a distinct victory for its objectives. (Defs. Ex. P, Govt. Ex. 224.) The dealers on the other hand refused to execute the proposed letter and instead stated that the agreement, which their own attorney held did not constitute a violation of the Sherman Anti-Trust Law, was in fact in violation of that Act. (Defs. Ex. C.) At a union meeting about that time the defendant Kibre said:

> "For the members who are not up to date with negotiations, Brother Kibre explains that an agreement was drawn up wherein both attorneys were agreed on the legality of the agreement, which is unusual. The dealers also thought the agreement fair and from the Union standpoint it was satisfactory, but that in a matter of two days the dealers changed their minds and decided not to sign the agreement, again bringing up the anti-trust scare. That it's not known yet whether the dealers are actually on the level and ultra ultra

scared or if something else is in the background which has not yet come to the surface. Either their attorney or the Anti-Trust people are being needled by someone else. Whatever the trouble is it should come out within a few days. In the meantime, our attorneys in Washington are working on it and on the Anti-Trust people in order to get to the bottom. We should hear from them in a few days."

On June 28 the dealers were notified of the termination of the strike by the International, which stated in part:

"It should be clearly understood that the Union will not permit a return to the long standing condition whereby fishermen in this area were forced to accept whatever price dealers arbitrarily set. This condition of uncertain prices, restricted production, forced high prices on consumers and kept the local industry chained to horse and buggy methods for the past 25 years.

"Only when fishermen are assured of a fair price before investing their labor and other costs in making a catch, can the San Pedro market industry operate on a full production basis with modern facilities and methods. The position of the Union is, therefore, a fight for the public interest—for more and better fish at fair prices to the consumer—as well as a struggle for a square deal to the producer." (Defendants' Exhibit W1.)

Kibre (Tr. pp. 319-55.)

Appendix G

Another offer of proof was submitted upon the basis of material prepared by the California C.I.O. Council Research Department. Following is a summary of this offer of proof:

The size of the small boat fleet in Southern California and its relation to the fresh-market fish industry is indicated by the following facts:

1. The small boat fleet in Southern California ranges in number between 944 and 1,195 for the year 1946, with the former number probably more accurate for the purpose of establishing the number of small boats actually engaged in full time commercial fishing.

2. The number of union boats in the small boat fleet is 504.

3. Purse seiners and tuna clippers are large boats bringing in fresh fish from time to time. But neither the Fish and Game Division nor the union can estimate how many of these large boats bring in fresh fish; nor when; nor how many individuals are involved; nor the amount and value of the fresh fish they do bring in.

4. The operators and crewmen of these boats (purse seiners and tuna clippers) are not members of Local 36, the local under indictment, but they do supply the fresh fish market.

5. Not all of the small boats fish for the fresh fish market. Actually the greater majority fish only for

albacore and mackerel for the canneries. This refers to Southern California generally; the situation varies in Santa Barbara where there is no mackerel cannery fishing. They will fish only for the fresh-market fish in the season when albacore and mackerel are not available. The reason fishermen prefer fishing for cannery fish is that the price and market are steady, and the canneries will take their entire catch even though the fresh market may pay slightly higher unit price.

6. There are a very small number of boats that fish for the fresh market all the year around. The union estimates them to number about 20.

7. In addition to these 20 boats, the union estimates that 236 small boats (25% of the small boat fleet) are regularly engaged in gresh market fishing as an auxiliary activity to their primary interest—fishing for the canneries.

Concerning the number of fishermen engaged in fresh market fishing, the following facts are offered:

1. The number of commercial fishermen in Southern California in the license year 1945-46 was 7327 according to the records of the Division of Fish and Game.

2. The Union estimates that there are 1437 regular commercial fishermen in Southern California in the small boat fleet. 747 of them are CIO members. 90% of them work on one-two- or three-man crew boats.

3. There is a good deal of competition in the fresh market from non-commercial fishermen. The exact amount is impossible to determine.

4. There are, according to the union estimate, 419 regular commercial fishermen engaged in fishing for the fresh market.

5. There are in addition to these 419 an unknown number of fresh market fishermen including small boat fishermen, party boat fishermen, and crewmen of purse seiners and tuna clippers. These fishermen compete with the regular fresh market fishermen at various times by furnishing irregular and varying amounts of fresh fish to the market.

With respect to the quantity of fresh market fish, there are the following facts:

1. The amount of commercial fish (cannery and fresh market) varied between 500,000,000 pounds and 739,000,000 pounds in the nine year period beginning in 1938.

2. The commercial catch in June, 1946, was substantially higher than the average catch in the last 7 years and 3 times as high as the 1942 catch.

3. The amount of fresh fish caught in the same period varied between 11,000,000 and 17,000,000 pounds.

4. The leading fresh fish are (1) barracuda, (2) mackerel, (3) California Halibut, (4) yellowtail, (5) white seabass, (6) swordfish.

5. Other factors beside price determine landings, e.g., the variable mackerel catch.

6. Fresh fish caught varies between 1.8% and 3.1% of the total fish landings.

7. The small boat fleets catch consist 87.6% of cannery fish and 12.4% of fresh fish.

8. Small boats will normally catch fresh fish if the mackerel and albacore season are ended.

With respect to fish prices, there are the following facts:

1. The prices paid to the fishermen for approximately one-third of their fresh fish are guided by the cannery price paid for the same species.

2. Barracuda represents the largest catch of non-cannery species of fresh fish.

3. Retail prices are determined by the price of fresh fish from other areas. The volume of out-of-state or Northern California fresh fish far outweighs Southern California fresh fish sold on the Los Angeles market.

4. In the month of June, 1946, during the strike, 413,225 pounds of fish were brought into Los Angeles County from the states of Oregon and Washington, compared with 293,251 in May, 1946. During the month of June, 242,636 pounds of fish were brought in by railway express agency as compared with 196,960 in May. These figures include the entire Los Angeles area. For San Pedro, the figures are for June, 41,407 pounds and for May, 1946, 35,741 pounds.

5. Seattle has much superior freezing facilities than Los Angeles, and therefore, fish can be and is shipped in continuously from the Seattle area.

With respect to the earnings of fishermen, the facts are:

1. The earnings of Los Angeles fishermen on both large and small boats varies according to the manner in which the statistics are evaluated from $1554.00 to $2221.00 per year.

2. The average earnings of all small boat fishermen engaging in fresh market fishing is about $1,022.00 per year.

3. The fluctuation in prices paid to fishermen is very great. For example, in January of 1942, halibut ranged from 8¢ to 25¢ per pound. In November, 1946, mackerel ranged from 1½¢ to 10¢ per pound. Similar fluctuations appear practically every month.

A number of offers of proof were made orally during the course of the trial. Some of them have been referred to in the footnotes under the statements of fact. Other such offers of proof are:

1. In 1937 and prior thereto, fish often sold to the dealers at so low a price that fishermen acting through the Union used to give their catch to charities, and in order to comply with the law and not destroy their fish. In 1936 and 1937, there were considerable negotiations with the wharfside dealers in San Pedro in an attempt to remedy this condition. As a result of such negotiations, the Union did appoint a man for a period of several months who acted on the pier,

first trying to negotiate for the individual catches of the fishermen for the purpose of getting the best possible price for each fisherman. That practice went on for several weeks. However, because of the fact that the individual appointed by the Union was always offered uniform prices by the dealers at any given time and at no time was able to negotiate any different price with any dealer than the first offer that was made to him at that given time, the practice of attempting to negotiate was discontinued. Thereafter, for several months the man did remain on the wharf and did participate in the process of weighing the fish as it came in. However, there was no further attempt to negotiate individual prices. (Tr. pp. 1501-4.)

2. Supplementing the offer of proof with respect to fishermen's earnings heretofore set forth in a footnote is the following:

(a) The defendant Kennison first fished during the year from 1939 to 1940 and earned approximately $700. Since that time he has averaged about $1500 a year. His maximum earnings from all sources in any year since that time was slightly under $2800 of which a little less than $2400 was from fishing and about $400 from other laboring employment concerning which he testified. (Tr. pp. 1498-9.)

(b) The defendant Smith has earned both from his share as a working fisherman and his share as the owner of a boat from a minimum of $800 to a maximum of about $5,000 a year. He has averaged slightly less than $2500 per year. In 1946, the year in which

he achieved his highest earnings, he earned about \$3800 for his share as a fisherman and around \$1300 or \$1400 for the boat share. During that year he spent about 8 months fishing and about 4 months working repairing the boat. The members of the crew who worked along with him spent the same amount of time fishing as he did and each earned \$3800, approximately, for which in addition they worked not more than 2 weeks repairing the boat. The defendant Smith received about \$1300 or \$1400 for approximately 3½ months work repairing the boat. If he had taken the boat to a contractor to have the repair work done, it would have cost him considerably in excess of \$1500. If the boat's share was credited to his time worked while repairing the boat, his earnings would have been less per day, per week and per month during that period than his earnings for the other 8 months, per day, per week and per month working as a fisherman. (Tr. pp. 1499-1500.)

(c) During the time that the defendant Sawyer owned a boat, he never made any money while working on it, he about broke even and received nothing for his labor. After he sold his boat, he went fishing for 2½ months on a share basis on another boat and during that period earned a total of about \$600.00. (Tr. p. 1500.)

(d) The defendant Phelps started fishing in 1934 and for the first few years thereafter did not earn in excess of \$1,000 a year for a full-time fishing effort. Since 1934 and up to the time of trial, he has never in any year earned in excess of the amount of \$2,000.

During these years, he fished on the average of 9 months a year, fulltime and spent about 2 or 3 months working on a boat, repairing the boat for which he received no extra compensation. He has no property except a little fishing gear, no car, no life insurance, no insurance on his boat (none of the fishermen are able to carry insurance on their boats because they are unable to afford it). (Tr. pp. 1663-4.)

(e) The defendant McComas first fished in 1942 and earned a little less than $2,000. In 1943, his earnings were about $1200, and 1944 about $1800. (Tr. p. 1265.)

(f) The defendant McLauchlan lived in a trailer for most of the period that he was a fisherman, for which trailer he paid $175. He was unable to obtain or afford a home in which to live. His entire other property is a 1937 Graham automobile. His earnings as a fisherman for the time that he has fished has averaged approximately $100 a month, except for three or four months when his earnings averaged slightly in excess of $125.00 a month. (Tr. p. 1665.)

(g) The most money that the defendant Munson made at any time since he started fishing was in the year 1946 when he netted $2700. His average has been well under $2,000 a year, probably closer to $1500 than to $2,000. He lives in a home which he purchased for a total price of $2500 and on which he pays $20.00 a month. (Tr. p. 1716.)

(h) The defendant Lackyard rents a home for $20.00 a month. His wife works as a telephone

operator. His earnings in 1944 were about $400, in 1945, about $685, and in 1946, $662. In 1943, his net income was also about $400. (Tr. pp. 1719-20.)

(i) The defendant Arthur Hill rents a place in which he lives for $17.50 a month. The last time that he went fishing was on a share basis and for a 2-week period he made $21.50. Prior to that he fished on his own boat in November 1945, for about a week, got caught in a storm, lost his anchor and lost about $30.00 on ice and groceries. Damages to his boat ran to about $30.00 and he caught no fish. The time before that, he was out for about a week and made about $50.00 above his expenses. In 1943, his net earnings were approximately $2500.00; in 1944, $750.00; in 1945, $725.00; and in 1946, $1500.00 (Tr. pp. 1717-18.)

3. At times when the price of fish to fishermen had dropped in one instance from 28¢ to 4¢ a pound, and in another instance from 16¢ to 2¢ a pound, each in a single day, a check of retail prices during those periods found the retail prices running 50¢ and over per pound, without any drop at all in retail prices at the time that there was this tremendous drop to the fishermen. (Tr. pp. 1718-19.)

During the trial on April 21, 1947, the defendants submitted a written offer of proof covering a number of matters.

Before unionization, the prices paid by the canneries, as well as by fresh market fish dealers, were subject to almost daily fluctuation, the prices varying as much as 500% within a period of one, or two, or

three days. However, at any given time of any given day, the prices paid by all dealers were the same. In addition, the prices paid by the canneries were extremely low. The price for top quality red salmon going as low as 2¢ per fish and the price for salmon as low as $3.00 to $3.50 per ton. It was common practice for dealers to patronize certain boats to the exclusion of others in return for a kick-back or special fee charged to the boat owner or crew. Short-weighting was common, open and notorious, including the practice of allowing an excessive flat weight for containers, resulting in the loss to the fishermen up to 15% of the total catch. As a result of these conditions, the fishermen up and down the coast, including the ports in the Southern California area were heavily in debt to the dealers and to the canners and were required to and did deliver all of their fish to the dealers or canners who were their creditors at whatever price was offered.

Conditions became particularly bad during the depression of the early 30's when the House Committee on Merchant Marine, Radio and Fisheries noted the comparison between the bad economic condition of the farmers and of fishermen, referring to them as being as badly in need of help as the farmers and as "the forgotten men in this country".

By 1936, after a number of years of organizational activity in the North Pacific, salmon prices had been raised more than 500%, the increased prices ranging from 10¢ per fish for pink to $1.00 per fish for spring salmon.

In 1929, the average annual earnings for fishermen in the United States was about $1,000.00. By 1931, this had fallen to $630.00. In 1933 the average annual earnings of fishermen working on a share basis in California was $847.30. However, as of that year, the small boat fisherman, averaged only about $300.00.

Organization in the fishing industry on the Pacific Coast is known to have existed as early as 1886, when the Columbia River Fishermen's Union was organized at Astoria, Oregon, and was chartered by the American Federation of Labor. The first effort to obtain an agreement with relation to prices of which there is any available record was made in 1886. The first strike of which there is any record occurred on April 1, 1896, and was conducted by the Columbia River Fishermen's Association.

In 1902 about 700 fishermen working in Bristol Bay, Alaska, went on strike for higher earnings, demanding that their pay be raised to 3¢ per fish.

By 1904 the Fishermen's Protective Union of the Pacific Coast, which had become affiliated with the International Seamen's Union, had some 5,000 members. From that time on, various unions formed at various ports and continued in existence for varying periods of time.

From about 1900 on, there have continuously been price agreements covering all species of fish in the Columbia River areas and in Alaska, and contracts are now in full force and effect in these areas. Copies of such contracts are attached to the offer of proof.

Beginning in about 1936, the union in the Puget Sound area began bargaining for the price of fresh market fish, and contracts establishing prices have continuously been entered into, with all of the canneries and with all of the fresh fish dealers located in the Seattle-Puget Sound area, and such contracts are now in force and effect. Examples of such contracts are attached to the offer of proof.

In the Northern California area, collective bargaining price agreements have been entered into with the canneries and reduction plants continuously since 1936, covering all such canneries and plants, and are now in force.

Starting in 1938, contracts setting prices for fresh market fish have been negotiated and enforced in all ports in Northern California and Sacramento River with all of the fresh market fish dealers located in said area. Over 125 of such contracts are attached to the offer of proof.

All of these contracts were entered into with buyers by associations composed of working fishermen, some of whom were boatowners and some of whom were non-boatowners; the contracts deal with the prices for the sale of fish by members of the association to the contracting buyers.

At various times during the negotiation, the services the United States Department of Labor Conciliation Division have been utilized to aid when a dispute could not otherwise be settled. The same is true prior to 1942 of the Maritime Conciliation Serv-

ice, an agency of the United States Government, which specialized in the settlement of maritime labor disputes. During the war, many of the fishermen union disputes were taken to the National War Labor Board, which Board ruled that prices paid to fishermen, both boatowners, and non-boatowners, constituted wages. The War Labor Board in more than 12 cases set the price of fish in War Labor Board awards as wages of the working fisherman.

For many years, there has been in full force and effect a regulation of the Fish and Game Commission requiring that before a fisherman goes fishing, he must have an assured market, that is, a specific order for potential catch. Where there have been collective bargaining agreements, this order has been complied with. Where no such agreements have existed, all attempts by fishermen to get advance orders have been futile and fishermen have been forced to go out and make their catches in violation of this regulation or not go fishing at all. During the period from 1937 and 1938 to the time of trial, the annual harvest of fresh market fish in Seattle where there were collective bargaining agreements, increased about 15 times. In the same period in Northern California, where there were also collective bargaining agreements, the catch approximately doubled. During the same period when there have been no such agreements in the Southern California area, the catch of fresh market fish has remained approximately constant.

In April and May of 1943, there was a period when the price of barracuda paid by the dealers dropped

from approximately 20¢ per pound to 6¢ per pound and finally the dealers refused to take any barracuda at all. During that entire period, the retail establishments were selling barracuda at a price between 55¢ to 60¢ per pound and there was no reduction in the retail price. The Fishermen's Union called a conference in May of 1943 in which O.P.A. participated. Investigation revealed that even with the prices at which the retail markets were selling barracuda, they did not have sufficient barracuda to meet the demand. Following the barracuda conference the dealers agreed to pay the fishermen a price of 10¢ to 12¢ per pound for barracuda and simultaneously agreed to reduce their sale prices. The result was that the price to the fisherman increased and the price to the consumer went down to approximately 38¢ to 40¢ per pound.

During the year 1945, seven Los Angeles fresh fish dealers purchased $479,896.00 worth of fish in the Southern California area and $2,567,028.00 worth of fish was brought in from outside the Southern California area. For 1946, the same figures were respectively, $605,670.00 and $4,338,500.00. There are a total of 229 such dealers and the proportion of fish which these companies purchased from landings outside Southern California as compared with landings inside Southern California is approximately the same as set forth above. During the month of June, 1946, there was no unfilled demand for fresh fish in the Southern California area, and the same was true with regard to all areas in the five Western states. All orders that were obtained or could be obtained were

filled. There was no change in the normal or the usual supply of fish to consumers or to the overall wholesale market in the Southern California area, or any other area in the five Western states.

At no time during the years 1945 and 1946, did any dealer in any locality pay a price different from that paid by any other dealer in the same locality. When there were changes in the price paid by dealers, those changes were uniform as to all dealers purchasing fish. These price conditions and practices existed at all times prior to 1945 as well as during the years 1945 and 1946. While prices paid fishermen would drop as much as 500% in a single day, the increase to the fishermen never incurred in jumps of more than a cent or two a pound.

There is no relationship between the price paid to fishermen and the price which the dealer charges for the fish. Tremendous drops in prices paid to fishermen do not result in drops in prices charged by the dealer.

Appendix H

"Mr. Kenny. * * * My first objection would be at line 8, 'at which the association itself or as sales agent for its members.' Now that clearly does not take into consideration the Stark County case and numerous other cases of bargaining cooperatives, where it is merely a cooperative agency. * * *

Mr. Margolis: But they don't have to sell the fish. They can bargain for the fish, the price at which the fish can be sold.

The Court. What is the difference?

Mr. Margolis. They are going to make a difference on it.

Mr. Kenny. That is what the Government is going to make a difference on. In other words, there are dozens, in every perishable commodity there are dozens of bargaining cooperatives. We have given you numerous citations to that effect. And it is a common practice, particularly in the perishable commodity field. At which the association itself sells the fish or negotiates for prices at which the members sell and deliver the fish.

The Court. Suppose at line 8, 'at which the association itself or as sales agent for its members', suppose we strike out and say 'which provides for and fixes the prices at which the fish caught by the members of the association is sold to a buyer.'

Mr. Kenny. Good.

Mr. Rubin. I don't think that is the law [101] your Honor please. I don't think that a cooperative has

the power to do that. A cooperative either functions as a business organization or as a sales agent.

The Court. I leave 'sales agent' in there. * * *

Mr. Margolis. One of the things, when you come right down to it there, I think it should read 'when formed for any such purpose' instead of 'for such purposes.'

Mr. Kenny. Any of such purposes?

Mr. Margolis. Because obviously it doesn't require them to collectively catch, collectively produce, collectively prepare for market, collectively process to collectively handle.

The Court. The statute uses it in the conjunctive.

Mr. Margolis. Yes, your Honor, but it is a permissive statute. It says they may do all of these things. If they do something less than the statute permits, that is all right. Otherwise then what it means is if they caught and marketed but did not process the act would not apply." (Tr. pp. 1853-58.)

Appendix I

"Defendants' Proposed Instruction No. 12

I instruct you that under a law of the United States, persons engaged in the fish industry, as fishermen, catching fish, may act together in collectively catching and marketing the fish caught, and may make and enter into all contracts necessary or desirable to accomplish such purposes.

I therefore instruct you that if you find that the Defendants, as members of the Defendant Union or Association acted or combined together for the purpose of catching fish, and acted or combined together for the purpose of procuring markets and market prices for fish caught by them, that such conduct, or acts or combination on the part of the Defendants, are permissible acts and not a violation of law, and you should therefore find the Defendants 'Not Guilty.'

15 U.S.C.A. 521;

U. S. v. Dairy Co-Op., 49 Fed. S. 475;

Columbia River Packers v. Hinton, 34 Fed. S. 970, 977;

Liberty Warehouse Co. v. Burley Co-Op., 276 U. S. 71, 72 L. Ed. 473. (50)."

(Tr. p. 47.)

"Instruction No. S-12.

I further instruct you that in order for the defendants to have the protection of the Fish Marketing Act, it is not necessary that they all act together in the

catching of the fish; it is sufficient under the law for the defendants to have the benefit of the Fish Marketing Act if they are members of an association which acts as a bargaining agent or sales representative for the fishermen and through which agent prices are negotiated and established.

Stark County Milk Products Assn. v. Tabeling, 192 Ohio St. 159, 98 A.L.R. 1393;

Johnson v. Georgia-Caroline Retail Milk Producers Assn., 182 Ga. 695, 186 S. E. 824;

Hulbert—Legal Phases of Cooperative Associations, p. 119. (71)"

(Tr. pp. 59-60.)

"Instruction No. S-13.

I further instruct that in the Fish Marketing Act, to which reference has been made, the word 'cooperative' is not used; nor is it contemplated, nor is it required by the terms of the Fish Marketing Act for a group of persons such as fishermen to receive the benefit of the Act that they be a cooperative as that term is legally and generally understood; that it is sufficient for the fishermen to act together in the marketing or selling of their catches of fish.

15 U.S.C.A. 521. (72)"

(Tr. p. 60.)

Appendix J

Senator Cummins said:

"I think combinations of farmers may be entered into for three general purposes: first, in order to lessen the cost of production. There are many ways in which combinations may be formed that will lessen the cost of production of whatever commodity the farmer may be engaged in producing. I think very worthy combinations may be entered into which will lessen the cost of marketing; that is, bringing the commodity to the place to which it is sold; and there certainly can be no objection whatever to any combination of that kind. There is not the slightest reason to believe that any combination to engage in lessening the cost of marketing—that is, in eliminating the middleman—could be found antagonistic to or in conflict with the antitrust law.

Combinations may also be formed, and, I think, ought to be permitted, having for their object the increase in the market price of the commodity. While that may be objectionable in some limited fields, recognizing, as I do, that the market price of farm products is generally below the cost of production, I do not object to combinations that have for their specific purpose the increase in the market value, so that the commodity may be sold at a fair and reasonable profit to those who produce them."

Appendix K

"Section 6 of the Clayton Act was read to you by one of counsel. I will read it again.

'The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock, or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.'

In connection with this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person.

Further in that connection the indictment charges that the defendant association Local 36, IFAWA, is in fact an association of independent businessmen engaged in the business of catching and selling fish for their own account and profit and that the members of Local 36 are not employees of the fish dealers. The

fact that said defendant association may refer to, act as, or call itself a labor union does not in and of itself make said association a labor union. An association of independent producers or of persons who are self-employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union.

If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees to the fish dealers, I charge you that the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective. They may, however, perform acts which affect or obstruct interstate or foreign commerce as a matter of law only if there is a labor dispute between the members of Local 36 and the parties against whom their acts are directed or intended to affect, in this case the fish dealers. Such a labor dispute, however, must affect the terms and conditions of employment of the members of Local 36 or the terms and conditions of their employment must be the matrix of any controversy or dispute you may find as a fact existed between the members of defendant association and the fish dealers.

If you find that there is a controversy between the members of Local 36 and the fish dealers and that con-

troversy is solely one over the price or terms and conditions at which the members of Local 36 shall sell their fish, and that such a controversy does not involve or affect an employer-employee relationship or is not the matrix of the controversy, then no labor dispute can be said to exist between the members of Local 36 and the fish dealers which would entitle the members of the Local 36 to combine together to restrain foreign and interstate trade and commerce in fresh fish as charged in the indictment, under Section 6 of the Clayton Act." (Tr. pp. 1943-45.)

Appendix L

"Mr. Margolis. First of all, our feeling about the thing is that this instruction is completely unnecessary because the question, as we see it, is not whether Local 36 is a labor union but whether Local 36 is composed of persons who are selling their labor, and if so, labor not being a commodity, whether you call it a labor union as that term is used is immaterial.

* * * * * * *

Mr. Margolis. We are pressing Section 6 and particularly that portion of Section 6 which talks about labor not being a commodity. The Hinton case was written with special reference to the Norris-La-Guardia Act in which it was absolutely necessary to determine whether or not the association was a labor union. That went to the very heart of the case. We are not claiming any exemption on that basis. We are relying on Section 6 of the Clayton Act, and this simply avoids that issue because the issue under Section 6 of the Clayton Act we are referring to is that labor is not a commodity.

* * * * * * *

Mr. Kenny. Well, now, the next sentence, it seems to me that that isn't the law, that is, there could be and are self-employed groups who are labor unions. Witness the Hearst v. NLRB decision.

It seems to me the Government has made its point by getting in the second sentence where it says 'the fact that said defendant association may refer to, act

as, or call itself a labor union does not in and of itself make said association a labor union,' but they are treading on ground that is not legally secure when they rule out self-employed persons from a labor union.

And, as I say, you have the newsboys case and you have the case of the Hard Rock Miners and others who are what they call leasers and to that extent self-employed but are labor unions. I think that the Government is asking for something here that just isn't the law.

* * * * * * *

The Court. If I strike out that sentence and change the next sentence, 'An association of independent producers or of persons who are self-employed', and then change the 'or' to say, 'and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union.'

Mr. Kenny. That would be all right if you added the language which we have in No. 8.

The Court. I have No. 8 before me. Do you have it?

Mr. Kenny. Yes, the third paragraph of No. 8 says, 'Such a circumstance legally exists where the so-called independent contractor or businessman gains his livelihood as the result of his own labor and the use of his own tools and where, as an individual,' —and this is the thing we need—'he lacks equal bargaining power in his dealing with those from whom his

livelihood is gained.' That is Justice Rutledge's language.

*   *   *   *   *   *   *

Mr. Margolis. Of course, we think what should be added there, your Honor, in addition to standing in the relationship of employees to the fish dealers, 'or who are selling their labor.'

Mr. Kenny. Products of their labor.

The Court. No.

Mr. Margolis. Or the products of their labor. Either one of those two ought to go in." (Tr. pp. 1870-7.)

Appendix M

"Defendants' Proposed Instruction No. 18.

It is one of the contentions of the Defendants in this case that in essence they are workers, or laborers, selling their services and the use of their vessels and equipment, as fishermen, at wages to be determined at so many cents per pound for fish delivered.

If you should find as a fact that they are such type of workers, being compensated as mentioned, then I instruct you that no law of the United States prevents them from agreeing among themselves to set a price on the fish, and you must therefore find them 'Not Guilty.'

Hopkins v. U. S., 171 U. S. 578;
Anderson v. U. S., 171 U. S. 604."
(Tr. pp. 50-51.)

"Instruction No. S-4.

You are instructed that the defendants here as a matter of law, are to be considered in the same category as agriculturists and horticulturists, and that agricultural and horticultural organizations instituted for purposes of mutual help and not having capital stock or conducted for profit are exempted from the operation of the anti-trust laws. Therefore, if you find that the defendants combined in an organization to sell the fish caught by them and did not include in their organization any persons other than fishermen

operating in the same manner that they did, you must return a verdict of not guilty.

(15 U.S.C.A. Sec. 17, Sen. Rep. No. 698, 63rd Congress, 2d Session, 1914, p. 46.)"

(Tr. pp. 53-54.)

"Instruction No. S-5.

I instruct you that a working producer is a person the basis of whose livelihood is his own labor or a person whose livelihood has his own labor as one of its chief factors. You are instructed that a working producer who joins solely with other similar working producers to fix the price of articles produced by them is not guilty of any violation of the anti-trust laws, and therefore, if you find the defendants are working producers who combined solely with other similar working producers for such purpose, you must return a verdict of not guilty.

(15 U.S.C.A. Sec. 17, Sen. Rep. No. 698, 63rd Congress, 2nd Session, 1914, p. 46.)"

(Tr. p. 54.)

"Instruction No. S-6.

Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combina-

tions or conspiracies in restraint of trade, under the anti-trust laws.

Such organizations are those where labor is the basis or one of the chief factors in the organizations, as in the case of labor organizations proper, and in agricultural and horticultural organizations. The reason for the exemption of these organizations from the operation of the anti-trust laws is because the labor of a human being is not a commodity or article of commerce.

Therefore, if you find that the defendants acted as members of an organization in which labor was the basis or one of the chief factors, they did not act in restraint of trade, and you must return a verdict of not guilty.

(15 U.S.C.A. Sec. 17, Sen. Rep. No. 698, 63rd Congress, 2nd Session, 1914, p. 46.)"

(Tr. pp. 54-55.)

"Instruction No. S-10.

I further instruct you that one of the defenses of the defendants is that the organization to which they belong and through which they function, Local 36, is a trade or labor union, and therefore, the acts of the defendants are not subject to the penalties of the Sherman Act. If they are acting solely in self interest and not in collusion with other economic groups you should acquit the defendants.

In determining whether said Local 36, one of the defendants, is a trade or labor union, you are instructed that it is the policy of the law, in criminal

cases (and this is a criminal case) that wherever, from a given set of facts, it is reasonably possible for a jury to make a finding or determination of fact in favor of the defendant, it is the duty of the jury to so find. In other words, after considering the nature of the activities, and history of Local 36, if it is reasonably possible for you to conclude that it is a trade or labor union, and is acting solely in self interest and not in collusion with other economic groups it is your sworn duty to acquit the defendants." (Tr. pp. 58-9.)

"Instruction No. S-14.

I further instruct you that under the laws of the State of California (and such laws are applicable in this Federal Court), fishermen catching fish acquire no title or ownership in the fish they catch. They merely acquire the right to use or dispose of the fish according to the laws of the State of California. These laws permit fishermen to take or catch fish and dispose of them as provided by law.

I therefore instruct you that the only right the fishermen acquire in the fisheries of this state is the right to use their labor and tools in the catching and taking of fish and to dispose of the fruits of their labor in accordance with the laws referred to.

I therefore further instruct you that the last mentioned matters should be considered with relation to one of the defenses of the defendants in this case which is that the principal or chief factor in their operations is labor expended in the taking or catch-

ing of fish and that in essence what they sell is their labor.

I therefore further instruct you that Section 6 of the Clayton Act, which has been referred to in this case, reads in part, as follows:

'The labor of a human being is not a commodity or article of commerce * * * nor shall (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.'

I therefore further instruct you that if you find the activities and operations of the defendants consist of their labor as set forth in the quoted portion of the Clayton Act, then I instruct you that the actions of the defendants in entering into any alleged agreement regarding the sale of their fish under the facts of this case are not in violation of law.

People v. Stafford Packing Co., 193 Cal. 719, 725;

People v. Huvdon Co., 215 Cal. 54;

People v. Monterey Fish Products Co., 195 Cal. 557;

Santa Cruz Oil Co. v. Milnor, 55 Cal. App. (2d) 56;

15 U.S.C.A. 17."

(Tr. pp. 60-62.)

"Instruction No. S-8.

An employee-employer relationship does not depend on the existence of a payroll providing for regular

compensation of workers at regularly-stated intervals. Such a relationship can also exist if the worker is paid for his services on a piece-work basis under which he is only paid as he delivers the article or piece which he has produced as the result of his labor and use of his own tools. Labor disputes may arise between such a piece worker and his employer.

A labor dispute may also arise between persons who, for other purposes, are technically independent contractors or businessmen and other persons, or groups of persons, who furnish the former the principal source of their livelihood.

"Such a circumstance legally exists where the so-called independent contractor or businessman gains his livelihood as the result of his own labor and the use of his own tools and where, as an individual, he lacks equal bargaining power in his dealings with those from whom his livelihood is gained.

Both piece workers and independent contractors or businessmen who find themselves in this economic position may lawfully join together in a labor union and, by collectively bargaining, seek to increase their compensation and better their working conditions.

If you find that the defendants are piece workers or independent contractors or businessmen, occupying the economic position I have just described to you, and if you further find that their activities as described in the indictment were confined to a combination among themselves (65) designed to improve

their own situation, then they have not violated the Sherman Act in any way and you must acquit.

> Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U. S. 91;
>
> N.L.R.B. v. Hearst, 322 U. S. 111 at 127;
>
> New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552;
>
> U. S. v. Hutcheson, 312 U. S. 219."
>
> (Tr. pp. 56-57.)

Appendix N

"13. I instruct you that if you find, under the facts of this case, that the defendants are the original producers of fish; and that none of their acts or agreements either contemplate or tend to restrict or interfere with competition of middlemen in or in the consumer market, you shall find the Defendants 'Not Guilty.'" (Tr. p. 48.)

"14. I instruct you that the Sherman Anti-Trust Law does not apply to agreements for the sale of fish entered into between the original working producers of such fish. That the Sherman Anti-Trust Act does not apply to agreements between working fishermen, which agreements may have for their object the setting of prices for their catch. That the purpose of the Anti-Trust Act is to prevent agreements relating to the sale of commodities in interstate commerce after such commodities have entered the market. Therefore, if you find that the defendants, as original working producers of fish, entered into agreements regarding the selling of fish, but that such agreements had no effect upon the resale of such fish after the fish entered the market or channels of trade, then I instruct you that you should find all of the Defendants 'Not Guilty.'

Sherman Act;
Clayton Act;
Philadelphia Rec. Co. v. Mfg. Asso., 63 Fed. S. 254, 261;

Anderson v. Shipowners Asso., 71 L. Ed. 298, 302;

Hunt v. Crumboch, 89 L. Ed. 1954."

(Tr. pp. 48-49.)

"15. I further instruct you that working fishermen may agree among themselves for the sale of their catch, they therefore have the right to enter into contracts for the disposition or sale of their products when such products enter the first channels of trade.

U. S. v. Bay Area Painters Asso., 49 Fed. S. 733."

(Tr. p. 49.)

"16. I further instruct you that there is no evidence in this case, nor does the government contend, that the Defendant Union or its members sought to control the price of fish in the trading market. And further, that the Sherman Act does not prevent laborers, workers, fishermen or farmers from combining together for the purpose of procuring a price satisfactory to them for the fruits of their labor.

U. S. v. Dairy Co-Operative Assn., 49 Fed. S. 475;

Hunt v. Crumboch, 89 L. Ed. 1954;

Allen Bradley case, infra." (Tr. pp. 49-50.)

"17. If you find from the facts in this case that the purpose and objectives of the Defendant Union and its members was to assure them a reasonable return or price for the fish products caught by their labor, then I instruct you that their activities in demanding a written contract detailing prices to be

paid for the fish caught by their labor is not a combination or agreement in restraint of trade and you must therefore find the Defendants 'Not Guilty.'

Allen-Bradley v. Local Union, 325 U. S. 797;
U. S. v. Hutcheson, 312 U. S. 219;
Hunt v. Crumboch, 325 U. S. 821."
(Tr. p. 50.)

"18. It is one of the contentions of the Defendants in this case that in essence they are workers, or laborers, selling their services and the use of their vessels and equipment, as fishermen, at wages to be determined at so many cents per pound for fish delivered.

If you should find as a fact that they are such type of workers, being compensated as mentioned, then I instruct you that no law of the United States prevents them from agreeing among themselves to set a price on the fish, and you must therefore find them 'Not Guilty.'

Hopkins v. U. S., 171 U. S. 578;
Anderson v. U. S., 171 U. S. 604."
(Tr. pp. 50-51.)

"19. I further instruct you that in so far as the facts of this case are concerned it is not a violation of law for fishermen, original working producers of fish, to agree with each other to dispose of their catch at an agreed price, so long as the agreement does not affect the right of any fisherman, who is a party to the agreement, to engage in the fishing industry and dispose of his catch as advantageously as the others may do.

Therefore, if you find from the facts of this case, and it is not disputed, that it was not the intention of the defendants to limit in any way the fishing activities of any fisherman in the agreement, then you must find all of the Defendants 'Not Guilty.'

Standard Oil v. U. S., 55 L. Ed. 619, 641-43."
(Tr. p. 51.)

Appendix O

Minnesota Wheat Growers' Co-op. M. Ass'n. v. Higgins, 203 N.W. 420 (Minn. 1925):

"There in no justification for the suggestion that an orderly, systematized, co-operative marketing authorized by law, to prevent a sacrifice of the farmers' products and to realize a reasonable profit, has any analogy to financial combinations in restraint of trade, which have at times tended to prevent the farmer from realizing a fair profit and a decent living. In fact, this co-operative measure may have more tendency to avoid monopolies by others than it does to create a monopoly by the limited number of farmers who will join it." (p. 423.)

"The association frees the market, makes it more open, less one-sided, less subject to manipulation and monopoly control on the part of those who deal in the commodities. It aids and harmonizes with this constitutional provision, which is aimed at those who hoard and speculate in food products, and who interfere arbitrarily and artificially with the natural flow of commerce in such products. It offers a plan as a basis for hope that the market may be stabilized and protected from fluctuation in price, which, in practice, is detrimental to the producer and of little benefit to the public." (p. 422.)

"Under similar statutes, where questions have been raised, it has been generally held that an organization of this character is not an unreasonable combination

in restraint of trade." (Citing numerous decisions.) (p. 423.)

Tobacco Growers' Co-Op. Ass'n. v. Jones, 117 S. E. 174 (N. C. 1923):

"An examination of this statute shows, we think, that this association is authorized for the purpose, not of creating a monopoly, but to protect the tobacco producers against oppression by a combination of those who buy, and not to authorize, and does not empower, those who produce the raw material to create a monopoly in themselves. * * * The sole object of the association is to protect the producer of the raw article from depression in the price by the combination of the large manufacturing corporations, controlled by a few men who can at the same time not only decrease the price to the producer, but can increase it at will to the consumer, and thereby accumulate in a few hands sums beyond computation. The co-operative association purposes to eliminate unnecessary expenses in selling and to prevent artificially forced reduction in the price paid to the producers. Instead of creating a monopoly, the object is by a rational method of putting the raw product on the market from time to time as there is a legitimate demand for its manufacture, and by the extension of credit to farmers to enable this to be done, to prevent a monopoly of the tobacco industry by those who manufacture it." (p. 178.)

"The co-operative marketing system was forced into existence to guarantee fair prices to the producer, a

fair wage for labor, and to prevent extortion upon the consumer. It increased consumption, by furnishing the consumer a regular supply at less price, and at the same time enabled the laborer and the farmer to obtain a remunerative return. In addition, the co-operative system eliminated unnecessary expenses and costs, as well as the enormous speculative profits realized by combinations which had taken control of the entire process between the producer and the consumer. * * *

There is no analogy between the proceedings to dissolve the great trusts which have benefited by this system, as in the Standard Oil and American Tobacco Cases and others, and these associations for the protection of the producers of cotton, tobacco, and peanuts, to market and to create facilities by which their crops will be placed upon the market gradually as called for, and not dumped into the hands of great financial associations at a financial sacrifice to the producers to be resold or manufactured at great profit. It is an entire misunderstanding of the facts to assert that an orderly, systematized co-operation among the producers to prevent a sacrifice of their products and to realize a living wage for the laborer and a reasonable profit for the producers has any analogy to the system by which great combinations of capital have prevented the laborer and the farmer alike from realizing a reasonable reward and a decent living." (p. 179.)

Dark Tobacco Growers' Co-op. Ass'n. et al. v. Dunn, et al., 266 S. W. 308 (Tenn. 1924):

"Giving the act full faith and credit, and taking into consideration the history of co-operative associations, it appears that the purpose is to reduce rather than increase the price paid by the consumer, and thereby create a demand for larger quantities of farm products. The object sought is an increased return to the producer by eliminating speculation and waste, obviating dumping, reducing freight rates, marketing in an orderly and economic manner, making the distribution of agricultural products between producer and consumer as direct as can be efficiently done, studying marketing problems from the standpoint of the consumer, and creating new markets.

Statistics show that the price paid by the consumer for farm products is sufficiently high, but that the producer receives only 35 per cent. of this sum, the middleman (so to speak) receiving 65 per cent. One of the main objects of the association is to bring about a more just apportionment of the price paid by the consumer. The righteousness of this claim on the part of the producer is generally conceded.

Economists agree that the farmer can only obtain a fair price for his produce by group marketing or co-operation. By co-operation the per capita consumption of California oranges in America was doubled in 16 years. This was accomplished by proper grading, packing, orderly marketing, and by extensive advertising. The California Fruit Growers' Exchange spent for advertising last year $875,000. But for co-

operation increased consumption by means of advertising would have been impossible. By co-operation $3,000 a year in freight was saved, and the total cost of selling and advertising for 1923 amounted to but 2.49 per cent. of the value of delivered fruit." (p. 309.)

"In our opinion, the classification of farmers into co-operative associations for the purposes set forth in the act is reasonable and natural, and one that should prove beneficial rather than detrimental to the public." (p. 311.)

Potter v. Dark Tobacco Growers' Co-op. Ass'n., 257 S. W. 33 (Ky. 1923):

"The fact that other productive groups can, do, and for many years have marketed their wares as groups, and not as individuals, and that they are and have been enabled through group organization or 'gentlemen agreements' to regulate the distribution and stabilize the prices of their products, is a fact known of all men, which can neither be denied nor blinked by the courts; as is also the fact that farmers, if unorganized, necessarily act as individuals and not as groups in marketing their products, resulting in 'dumping' by the farmers, distribution by speculators, an unconscionable and uneconomic spread between producer and consumer in the necessities of life, and an inevitable demoralization of basic economic conditions, to the hurt directly or indirectly of every citizen.

With a clear recognition of this fact borne in upon the public conscience by the threatened economic col-

lapse of the farming industry indispensable to public welfare and national stability, if not national existence, an enlightened public opinion unmistakenly demands that farmers be permitted to organize for the marketing of their crops, not merely for their own protection, but for the public good." (p. 35.)

List v. Burley Tobacco Growers' Co-op. Ass'n., 151 N. E. 471 (Ohio 1926):

"In determining whether co-operative associations organized for the purpose of marketing agricultural products are such a favored class as to be within the inhibitions of the fourteenth amendment, we must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in any commercial enterprise, and we should further look to the fact that many of them are very small producers of such limited means that they must market their products immediately after harvesting, and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities." (p. 480.)

Brock v. Hardie, Sheriff, et al., 154 So. 690 (Fla. 1934):

"At common law, monopolies were considered odious and inimical to public welfare. Whether created by governmental grant or by acts of private parties, persons, or corporations, their purpose is to

produce a situation or condition of trade and commerce inimical to the general welfare in the suppression of competition and the deprivation of many persons of their means of livelihood to the advantage and individual financial gain of the persons creating the monopoly. Those combinations are commonly called trusts.

The purpose of co-operative marketing associations is different. Their design is to promote industries, conserve the interests of the producers of the commodities, and secure markets for the produce to the end that the consumers may obtain such commodities at reasonable prices while the producer obtains a fair and reasonable return upon his investment and activities. Their existence is founded upon an economical necessity. Artificial scarcity of commodities is not designed to be produced nor to unreasonably increase the cost of the articles produced but on the contrary to serve a useful and needed service to the community and producer in making provision for a liberal supply and the prevention of a flooding of the market.

41 C. J. 166.

Such organizations have generally been held to be valid and not in conflict with laws against unlawful combinations in restraint of trade nor in violation of equal protection and due process clauses of the Federal Constitution. (Citing cases.)

While industrial co-operative marketing societies may be subject to the laws concerning combinations and contracts in restraint of trade, they have been, to the extent of the commodities and activities mentioned

in the exempting statutes heretofore mentioned, exempted from the operation of those laws.

The conclusion we reach therefore is that the anti-trust statute of this state is not rendered invalid by the alleged illegal discrimination in favor of the commodities handled by or produced by the co-operative marketing associations nor by the exemption of such associations from the operation of the act." (p. 696.)

See also:

U. S. v. Dairy Coop. Ass'n (McCalber), 49 F. Sup. 475;

Kansas Wheat Growers v. Charlet, 118 Kan. 765, 236 Pac. 657;

Liberty Warehouse v. Burley Tobacco Soc., 271 S. W. 695 (Ky. 1925);

Dark Tobacco Growers v. Mason, 263 S. W. 60 (Tenn. 1924);

So. Carolina Cotton Growers v. English, 133 S. E. 542;

Louisiana Farm Bureau v. Bacon, 164 La. 126, 113 So. 790, approving 107 So. 115;

Kansas Wheat Growers v. Oden, 124 Kan. 179, 257 Pac. 975. See 279 U. S. 435, 80 L. Ed. 781, 73 Fed. 787;

Kansas Wheat Growers v. Rowan, 123 Kan. 169, 254 Pac. 326;

Lennox v. Texas Cotton, 55 S. W. (2d) 543;

Kansas Wheat Growers Ass'n. v. Schulte, 216 Pac. 311 (Kan. 1923);

Ex parte Baldwin Co. v. Producers Corp., 203 Ala. 345, 83 So. 69;

Anaheim Citrus Fruit Ass'n. v. Yeoman, 51 Cal. App. 759, 197 Pac. 959;

Railroad v. Tobacco Co., 147 Ky. 22, 143 S. W. 1040;

Casterland Milk Co. v. Shewtz, 179 N.Y.S. 131;

California Raisin Growers v. Abbott, 160 Cal. 601, 117 Pac. 767;

Dark Tobacco Growers v. Robertson, 150 N. E. 106.

Appendix P

The defendants stated their objections as follows:

"Mr. Margolis. To begin with, your Honor, we object to the whole instruction. * * *

Mr. Margolis. We want to object to this also on the ground that it is an incorrect statement of the law, that the Socony-Vacuum Oil case, on which it is based, applies only to situations where there is a sort of combination which has a tendency to affect consumer prices, and also that it applies only to combinations in which there is something more than a mere agreement with regard to prices, but there are artificial means, such as buying up and keeping products off the market, which artificially raises and maintains the price to the consumer and does not apply to a situation where competition remains in the market by virtue of competition with other products and the price to the consumer is not necessarily affected.

We also want to object to this instruction on the same ground as we objected to Instruction No. 1, that it practically throws out the defense of the Fishermen's Marketing Act and of the Clayton Act, Section 6 of the Clayton Act which we have referred to. And also as to this particular objection, it should at least state that if you find these facts alone and no other facts, and that leaving that out makes the instruction incorrect upon the second ground of objection.

Mr. Kenny. Furthermore, I have one other point, and that is, that the words 'market prices' as used in

line 16 means, in the Socony-Vacuum case, maximum prices to consumers and not market prices to those who buy for resale, and market prices as it stands here undefined simply cannot be understood by the jury.''

''Mr. Margolis. * * * It is our contention that the rule of reason does apply to this sort of a situation, and our previous argument with regard to the Socony-Vacuum Oil Company case applying to consumer prices and situations, which we have previously defined, and not to the situation here, is hereby incorporated by reference in our objections.'' (Tr. 1850-52, 1916-17.)

Appendix Q

"Defendants' Proposed Instruction No. 6.

As to Rule of Reason.

I instruct you that the Anti-Trust Act does not forbid or restrain the power to make normal or usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, the term 'restraint of trade' should be given a meaning which would not destroy the right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce. Therefore, if you find from the facts of this case, that the agreement or contract, or combination, or conspiracy which the Government contends was entered into between the Defendants, was an agreement which reasonably may be considered as a normal or usual agreement for the marketing of their products, then you should find the defendants Not Guilty.

U. S. v. American Tobacco Co., 55 L. Ed. 663, 694;
Standard Oil v. U. S., 55 L. Ed. 619 (43)."
(Tr. pp. 42-43.)

"Defendants' Proposed Instruction No. 8.

I further instruct that if you find the agreement, combination or so-called conspiracy with which the defendants are charged, to be reasonable, in view of all of its considerations, then and in that event, I instruct you to find all of the defendants Not Guilty.

In determining whether the agreement is reasonable you are to be governed, at least in part, by the following factors:

1. The Fish & Game laws of the State of California which prohibit waste of fish.

2. The same laws, which require all fish caught to be marketed or used.

3. The same laws, which require fishermen to have bona fide orders for the sale of fish before they are caught.

4. The fact that under such laws, in order to procure orders for sale or delivery of fish to be caught, whether it is reasonable for the fishermen to insist upon a price in advance of embarking on the fishing voyage.

5. Whether it is a fair, sensible and reasonable practice for the Defendants to insist in advance for prices to be set for their catch of fish.

6. Whether it is reasonable for fishermen, whose labor is rewarded by the price at which their catch is sold, to know and determine in advance the basis, or rate, at which they will be compensated.

7. Whether they intended to restrain any sale of fish caught by them, or either of them.

8. The fact that they are not accused of endeavoring to set the resale or consumer price of fish by concert of action with the wholesale buyers or dealers in fish.

9. That one of the purposes and objects of the fishermen is to prevent the decline in fish prices to a point where commercial fishing would not pay them a fair return for their labor.

10. That by setting prices in advance, and at a price considered (45) by them to be fair and reasonable as a return on their labor, the defendants endeavor to stabilize the entire industry.

11. Whether the defendants sought to limit production of fish, or sought to increase the production and procure greater markets for and consumption of fish.

Appalachian Coal v. U. S., 77 L. Ed. 825;
Standard Oil v. U. S., 221 U. S. 1;
U. S. v. American Tobacco, 221 U. S. 106."
(Tr. pp. 44-45.)

"Instruction No. S-16.

In considering the question as to whether the activities of defendants have been unreasonably in restraint of trade, I instruct you that the purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest; to afford protection from monopolistic tendencies and combinations. The restrictions imposed by the Sherman Anti-Trust Act are not mechanical or artificial. Its general phrases and language, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. These phrases call for vigilance in the detection and frustration of all efforts unduly or

unreasonably to restrain the free course of interstate commerce; but they do not seek to establish a more delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The law has established that only such contracts and combinations are within the prohibition of the Act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interest by undue restriction, combination or unduly obstructing the course of trade. The question of application of the statute to any business practice is one of intent and effect and is not to be determined by arbitrary assumption. It is, therefore, necessary in this case to consider the economic conditions peculiar to fish catching and marketing; the practices which have existed; the nature of the defendants' methods, problems and difficulties in selling their catches; and the reasons which led the defendants to adopting the method of selling their catch and the probable consequences of carrying out that plan in relation to market prices and other (75) matters affecting the public interest insofar as the catching, sales and consumption of fish affect that public interest.

Appalachian Coals v. U. S., 288 U. S. 344."
(Tr. pp. 62-63.)

"Defendants' Proposed Instruction No. S-17.

I further instruct you that in enacting the Sherman Anti-Trust Act the evil sought to be eliminated was the bad effect upon interstate commerce which had been caused by monopolists agreeing among themselves to increase prices to consumers, and Congress felt that in artificially increasing such consumer prices such artificial prices would lessen the flow of interstate commerce. But it is the effect upon consumer prices which the Sherman Act sought to eliminate and therefore an agreement relating to prices must be an agreement which would tend to, or have an effect upon, consumer prices in order to be a crime under the Sherman Anti-Trust Act.

Therefore, if you find from the evidence in this case that there was an agreement among the defendants to set the prices of the fish they sold to the fish dealers or fish markets but that said agreement would not tend to, or have an effect upon, consumer prices, then I instruct you that such an agreement is not a crime or violative of the Sherman Anti-Trust Act.

Standard Oil Co. v. U. S., supra;
Socony-Vacuum Oil Co. v. U. S., supra."
(Tr. pp. 63-64.)

Appendix R

United States v. Hutcheson, 312 U. S. 219, 85 L. Ed. 789:

"The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex Printing Press Co. case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct. * * * It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters

far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U. S. 381, 391, 83 L. ed. 784, 789, 59 S. Ct. 516, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' *Johnson v. United States* (CCA 1st), 163 F. 30, 32, 18 LRA (NS) 1194, 2 Am. Bankr. Rep. 724.

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Juidiciary."

Appendix S

That this is so has been established specifically in this case by the fact that fish shipped in from other areas where price stabilization agreements between fishermen associations and dealers have existed for many years, competes so easily with locally caught fish that a much larger volume is shipped in to the area than is caught in Southern California. In fact, during the period that the price agreements have been in effect in the other areas and such agreements have not been in effect in the Southern California area, the production of fish has increased at an amazing rate in the areas where the agreements exist and has remained practically static in the Southern California area. If price stabilization agreements between fishermen and dealers tended to increase the prices charged by the dealers, the necessary effect would have been the reduction of the catch in the areas where the agreements existed and the increase of the catch in the areas where there were none—the exact opposite of what actually happened.

As to the effect upon consumer prices, records kept by the State Fish and Wildlife Service between the years, 1933, 1940 and 1944, of which this Court can take judicial notice, establish the validity of defendants' position. For example, in 1933 the fishermen received four cents per pound for sole and the average retail price was eighteen cents, a markup of fourteen cents. In 1940 the fishermen receiver three cents and the consumer continued to pay eighteen, a markup of

fifteen cents. In 1945 the price to fishermen was five cents, one cent higher than it had been in 1933 and two cents higher than in 1940. The retail price, however, went from eighteen cents to forty-nine cents per pound, a jump of thirty-one cents. That there is no real relationship between the price which is paid to the fishermen and the price which the consuming public pays for the fish is illustrated by all of the records of that Service. The fact is that the price which is paid for fish, as shown by charts in the various reports of the Service, follows very closely the price of protein foods such as meat, cheese, etc., regardless of the price that the fisherman happens to be getting for his catch.

Appendix T

"The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, as the real and ultimate end, *to raise the price of gasoline in their sales to jobbers and consumers* in the Mid-Western area. * * * In essence the raising and maintenance of the spot market prices were but the means adopted for *raising and maintaining prices to jobbers and consumers.* * * * There was also ample evidence that the spot market prices *substantially affected the retail prices* in the Mid-Western area during the indictment period. As we have seen, Standard of Indiana was known during this period as *the price or market leader* throughout this area. It was customary for the retailers to follow Standard's *posted retail prices,* which had as their original base the Mid-Continent spot market price. * * * *Retail prices* in the Midwestern area kept close step with Mid-Continent spot market prices during 1935 and 1936, though there was a short lag between advances in the spot market prices and the *consequent rises in retail prices.* * * * In sum, *the contours of the retail prices conformed in general to those of the tank car spot markets.* The movements of the two were not just somewhat comparable; they were strikingly similar. *Irrespective of whether the tank car spot market prices controlled the retail prices* in this area, there was substantial competent evidence that *they influenced them—substantially and effectively.* And in this connection it will be recalled that when the

buying program was formulated it was in part predicated on the proposition that a firm tank car market was necessary for *a stabilization of the retail markets.* * * * *Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline* than they would have paid but for the conspiracy." 310 U. S. 190, 191, 198, 199, 200, 220; 84 L. ed. 1151, 1155-56, 1166.

Appendix U

It has been recognized time and time again in governmental reports and in Congressional debates that the position of a fisherman is a peculiarly helpless one. It has been compared to that of a farmer whose crops are subject to changes in weather, as well as numerous other uncertainties. In this respect the fisherman is even more helpless. He has no control whatsoever over supplies. He can not choose to plant 20 acres instead of 40 acres, or 40 acres instead of 20 acres. The supply of fish is controlled entirely by natural causes about which, unfortunately, very little is known. Although both the farmer and fishermen deal with perishable products, the fisherman is even more helpless than the farmer in this regard. He has no opportunity whatsoever to withhold his catch from the market for the purpose of obtaining a reasonable price. The Court can take judicial note that during bad times farmers often destroy crops or permit them to rot on the trees or in the ground in order to prevent the supply on the market from becoming so great that the price is driven down even below existing depressed levels. The fisherman can not do this; he must sell his catch or he violates the law. True, if there is too great a supply of fish, the fisherman does not have to go out and can simply allow the fish to remain in the ocean. However, generally speaking, when the fisherman goes out to make his catch, he has no way of knowing how much fish either he will bring in or the other fishermen who go out will bring in. He

has no way of knowing what the supply is. All he can do is go out and if he finds the fish available catch as many as he can, at the same time that other fishermen are doing the same thing, and when he returns he must face the conditions as they are and dispose of his fish at whatever price is offered under those conditions. The dealer, on the other hand, buys at the depressed prices, holds the fish for demand and gets continuously stable prices throughout the year. In a report made by Mr. L. C. Salter, fishery economist of the United States Department of Commerce, Bureau of Fisheries, in 1937, the following appears:

> "The fisherman is dependent upon seasonal fluctuations in the production of fish which is further affected by the elements of weather. Fish, especially certain species of edible fish for the fresh market, move in large runs or schools. Fishermen know that the fish must be caught when and where they are found. Consequently at times greater quantities of fish are caught in limited areas and in brief periods."

The State of California has recognized the problems created for the processor by reason of the variations in supply of fish and has enacted legislation dealing with the subject. Thus in the case of *People v. Monterey Fish Products Co.*, 195 Cal. 557, the Court said:

> "* * * It is to the interest of the people of the state that the packing plants engaged in the packing and preparing of fish for human consumption shall be operated efficiently and economically, so that the price of their product to

> the consumer thereof may be kept down. A packing plant can be operated most efficiently and economically when it is enabled to operate steadily at a constant rate of output approaching its maximum capacity. But when the fishermen start out to make a catch no one can foretell with exactitude the size of the catch which they will take. Therefore, in order to insure so far as practicable that the catch for each day shall approximate the capacity of the packing plant the act provides that the fish and game commission may, after a hearing, give the packer a permit which will enable him to engage for the taking of a specified quantity of fish in excess of his packing capacity, and upon occasions when such excess quantity is brought in to use the same for reduction purposes."

If the processors are to be allowed to deal reasonably with their problems arising out of the variation in supply of fish, is it not reasonable that fishermen should be allowed to combine to solve similar problems?

Appendix V

"As a matter of law, persons engaged in the business of catching fish for sale and profit may act together in an association in collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by their members. When formed for such purposes, such an assocation may, on behalf of its members, enter into a contract with a buyer of fish which provides for and fixes the price at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer. *Such contracts must, however, be arrived at by free and voluntary negotiations between the parties thereto.* I charge you that if you find as a fact that the defendant association is the type of association before described, *any such contracts must be separately and voluntarily entered into and negotiated by and between the association and the buyers of fish, and that neither said association or its members can force any buyer of fish to enter into such a contract by practices and tactics which are not free and voluntary. Such a contract entered into between the defendant association and a buyer or buyers of fish under the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade.*

"Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. *They are to be considered by you as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment.* If you find that the defendants did not so combine or conspire, then you should acquit the defendants." (Tr. pp. 1942-43.)

Appendix W

"I further instruct you that the only matter or facts you may consider in this case must be limited to the so-called agreement between the defendants which the government contends is in restraint of trade—that is, whether under the facts covered by the agreement, the agreement is in unreasonable restraint of trade. You are therefore to disregard any and all evidence in the case relating to such things as strikes, boycotts, picketing, etc. except in so far as those acts may tend to establish the fact of the defendants entering into or seeking to enter into an agreement to procure certain prices for the fish caught by the labor of the defendants. In other words the law is not concerned with any means used by the Defendants, but is only concerned with whether the agreement itself is in unreasonable restraint of trade." (Tr. pp. 45-46.)

"You have been advised that all of the defendants claim (among other defenses) to have been operating under the terms and protection of the Fishery Marketing Act, a law of the United States.

If you find that their activities come within the meaning of that Act, then you must find the defendants Not Guilty.

In determining whether the activities of the defendants come within the meaning of such Act, you are instructed that it is the policy of the law, in criminal cases, that wherever, from a given set of facts, it is reasonably possible for a jury to conclude that such

acts are within the law, it is the duty of the jury to so find. In other words after considering the nature of the agreement entered into by the defendants, and bearing in mind the terms of the Fishery Marketing Act as heretofore explained to you, if it is reasonably possible for you to conclude that the Acts of the defendants have the protection of such Act, it is your duty to so find and acquit the defendants.

In considering this question, you should ignore the evidence relating to picketing, boycotting, interstate commerce and strikes." (Tr. pp. 55-56.)

"I further instruct you that evidence of coercive methods and tactics such as boycotting and picketing was only admitted for the limited purpose of showing the participation of the various individual defendants in seeking to obtain a price-fixing contract. It is the contract alone that determines the legality or illegality of the acts of the defendants under the conspiracy alleged in the indictment. If you find that the contract proposed by the fishermen to the fish dealers (Government's Exhibit No. 3) is one which they were legally permitted to enter into, then you must disregard the evidence of boycotting and picketing for any purpose and find the defendants not guilty." (Tr. p. 58.)

Appendix X

Testimony of Arthur Webster Ross.

"Q. When were the pickets withdrawn, Mr. Ross, to your knowledge?

A. By July 1st.

Q. Now, then, from May 29th to July 1st, apart from those two days, did the Railway Express Agency unload any fish on the wharf of the fish pier at San Pedro?

Mr. Garrett. One moment, please. Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case.

* * * * * * *

Mr. Andersen. The objection is that this matter relating to picketing is incompetent, irrelevant, has nothing to do with the matter charged in the indictment, and we would like to argue the point, may it please the court.

* * * * * * *

The Court. The objection will be overruled. The objection made both by Mr. Garrett and by Mr. Andersen will be overruled.

Mr. Garrett. May I state, if your Honor please, my objection is not based upon the general proposition but what I believe to be the lack of causal connection shown by the foundation.

The Court. I think I understand it.

Those objections are both overruled." (Tr. pp. 162-63.)

* * * * * * *

"Q. What did Mr. Zafran say to you? Can you recall his words or the substance of what he said to you? Mr. Zafran said to you as follows. Now what follows, if anything?

A. You can sell and deliver through the Railway Express or whatever means we will have to get rid of it, by truck, during May 31, which was Friday, and June 1st, which was a Saturday. That gave us a chance to clean up all fresh fish so that we would not have any loss.

Q. Was any conversation had between yourself and Mr. Zafran as to any other fish that would come in on either the landward or the seaward side?

A. After that we could not ship.

* * * * * * *

Q. What were the words, not the identical words because probably you may not be able to remember them, but what was the substance of the words that Mr. Zafran used to you that morning, if anything, with respect to additional fish coming in or going out?

A. No fish would be permitted to come in on the seaward side or on the land side after Saturday, June 1st.

Q. All right. Did you say anything to him after he said that to you?

Mr. Andersen. Same objection runs to this line of testimony, your Honor.

The Court. Overruled." (Tr. p. 166.)

"Q. (by Mr. Schwartz). I show you Government's Exhibit No. 1, and ask you whether you saw the people walking around as is portrayed in the exhibit.

Mr. Margolis. May we have a general objection—

Mr. Schwartz. Just a minute.

Q. (by Mr. Schwartz). —as you have just described in your previous answer?

Mr. Margolis. May we have a general objection to this line of questioning?

The Court. Surely. It will be deemed that the defendants have objected to each and every question on the grounds heretofore indicated concerning this line of testimony from this witness, and the objection is overruled.

Q. (by Mr. Schwartz). Go ahead, Mr. Vitalich.

A. Yes, I saw men walking up and down with similar placards, and I won't swear it was all these men the same day, some of these faces were familiar either that day or for about a month.

Q. For about a month.

A. For about a month. I saw these men either one day one group, maybe next day there would be another group; but these faces are familiar, some of them I recognize that I saw them at the place at the strike." (Tr. p. 314.)

"Q. Do you recall what day that was or what date?

A. It was about the first or second day after we discovered there were pickets on the truck side, and about the first or second day I saw this boat with an 'unfair' sign on top." (Tr. p. 316.)

Testimony of John Louis Di Massa.

"Q. Do you recall anything unusual at your place of business on that day?

A. Pickets in front of the market and a picket boat on the water-front side.

Mr. Margolis. If your Honor please, I move to strike the testimony on the ground it is incompetent, irrelevant and immaterial, no relation to any issue in this case; and ask that we may have a standing objection to this line of questioning with this witness.

The Court. Motion is denied, and the objection will be deemed to have been made to each and every question on this line, without its repetition, with the same ruling by the court.

Q. (by Mr. Schwartz). Now you mentioned something about pickets in front of the place. Will you describe what you saw?

A. There was about 10 or 15 men carrying banners, demanding a living wage, something to that effect, no price, no fish, no contract, no fish—something like that. It was quite obvious the place was being picketed.

Q. It was what?

A. It was obvious the place was being picketed." (Tr. p. 397.)

"A. They were off the dock, they were on the road which our trucks travel to go back onto the dock.

Q. They were on the street, the road?

A. Yes, sir.

Q. Did they do their picketing as you have described on that side or did they also go on the other side of the dock, on the seaward side?

A. They had a boat on the water in the harbor.

Q. I am talking now about these pickets that you described carrying these banners.

A. On the dock, no. I didn't see any.

Q. The ones that you saw—

A. Were on the streets and the picket both."
(Tr. p. 398.)

"Mr. Margolis. I would like to make a suggestion that may be acceptable to the court and to counsel for the government. As has been indicated, we do object to all testimony concerning boycotting, picketing, and other economic activities in connection with the obtaining of this agreement. We know what the court's rulings have been, and our objections have been made simply for the purpose of preserving our record.

The Court. I understand.

Mr. Margolis. We would be perfectly satisfied if we had a running objection to that entire line of testimony, to not continue making those objections and take up the time of the court. We know what the ruling of the court is going to be; we don't wish to argue it any further. It seems to us it would save time.

The Court. I think that should be agreeable. I don't think counsel should be under necessity of stating their objection each time, if some stipulation can be framed to protect the record in that respect. It is certainly agreeable to me." (Tr. pp. 406-7.)

Appendix V

"Q. (by Mr. Margolis). I show you a document, a photostatic copy of a document which has been marked Defendants' Exhibit O for Identification, which purports to be a copy of a letter on the letter-head of International Fishermen and (2558) Allied Workers of America, dated June 5, 1944, addressed to All Southern California Fish Dealers, and ask you whether that is the letter you just referred to.

A. This is." (Tr. 2559.)

"Mr. Margolis. At this time we offer Defendants' Exhibit O for identification in evidence.

* * * * * * *

The Court. He said this is offered for a limited purpose. Didn't you?

Mr. Margolis. I said it was offered for the purpose of showing the kind of an organization this was through its activity. Not that the statements in there are true, but that this is what they were saying and doing at the time." (Tr. p. 2560.)

"The Court. It is immaterial. Objection sustained." (Tr. p. 1295.)

Appendix Z

"Mr. Dixon. Now the objection is made, your Honor.

The Court. And the ground?

Mr. Dixon. On the ground it is immaterial and self-serving, particularly portions thereof.

Mr. Margolis. Any activity, I assume is self-serving.

Mr. Dixon. As I understand it, your Honor, the purpose of this line of testimony is to show the nature of this organization as an aid to the jury in determining what kind of an organization it is. I submit that this kind of a document does not help in any way on that basis and therefore is wholly immaterial." (Tr. p. 2579.)

"Mr. Margolis. We can show what it was by what it said and did. This is the way the local acted. It didn't act by digging ditches. This is what it did.

The Court. Objection sustained." (Tr. p. 1302.)

Appendix AA

"Mr. Margolis. I offer the letter in evidence as Defendants' Exhibit Q.

Mr. Dixon. I now object, if my previous objection has been premature.

* * * * * * *

The Court. Objection sustained." (Tr. p. 1305.)

Appendix BB

With respect to these documents, the record shows:

"Mr. Rubin. We object, if your Honor please, on the ground that they are incompetent, irrelevant and immaterial.

*　　*　　*　　*　　*　　*　　*

The Court. Objection sustained." (Tr. p. 1361.)

Appendix CC

"Mr. Rubin. * * * Your Honor will recall, and the record so indicates, at the time Government's Exhibit No. 6 was admitted into evidence, an objection was made that that was not the best evidence and that the best evidence was the original books from which those original compilations were made.

Your Honor at that time ordered that the books be brought in court for the purpose of affording the defendants an opportunity to examine them to test the accuracy of those compilations. I have the record references marked if your Honor chooses to read them.

* * * * * * *

Mr. Rubin. * * * after observing information taken from the books which, in my opinion, were beyond the scope and purpose of the production of those records, I stated to those present whom I have named that in my opinion the purpose of that examination was solely to test the accuracy of Government's Exhibit No. 6 and for no other purpose, and Mr. Margolis stated that they would use those books for any purpose of their case. * * *

Mr. Margolis stated that I had no right to order them as to any method of proof, and I stated that I felt my obligation was to see that the Court's order in so far as I understood it was to be carried out.

Mr. Anderson then stated that I was entitled to no further statement from them other than that which

they had given, and Mr. Margolis asked if they could go back and examine the books, and I said 'only for that purpose.'

After other conversations these gentlemen left. * * *

Mr. Margolis. The statement made by counsel is partially accurate and partially inaccurate; inaccurate in large part in what it omits.

Mr. Rubin came into the office where we were working and asked if we were doing anything more than adding up those figures which were represented by the totals in People's Exhibit 6. We said that we were, but that we would not tell him what we were doing, and that we did not have to tell him what we were doing, and that we were not subject to the supervision of Mr. Rubin as to the manner in which we inspected the books.

The information which we were taking from the books consisted of species of fish, pounds, and prices. * * *

We told Mr. Rubin that we did not think we had to advise him in advance of the subject-matter of our cross-examination, or of the manner in which we were going to conduct our cross-examination.

Our position, very simply, is this, your Honor:

First. We are prepared to tell the court precisely what we were doing and the purpose for which we were doing it. We are not prepared, unless otherwise directed by the court, prior to the cross-examination, to reveal to the government the purpose for which we were gathering those figures. * * *

Second. * * * The best evidence in this situation is the books themselves. Ordinarily, except for a modification of the best evidence rule, the books themselves would be required to be in evidence, and if the books were in evidence then we could utilize those books for any purpose material to the case, whether helpful to us or helpful to the theory of the prosecution. * * * I submit that we would have the right to cross-examine this witness with reference to anything which those books showed, which was material, and that the government could not limit its offer in those cases to prove its own point and say, 'You can't prove anything by those books because we offered it only to prove our point.'

If evidence goes in, unless limited by the court, it goes in for all purposes. The summary being merely a summary of what is in the books it is, in effect, as if the books had gone in, as far as our right to examine the books is concerned and to cross-examine the witness on the basis thereof. * * *

The Court. * * * it was about 4:00 o'clock yesterday afternoon until 6:00, is that correct?

Mr. Margolis. From 5:00 to 6:00 was spent in arguing.

Mr. Rubin. I beg your pardon, I would say about 10 minutes was.

The Court. Well, it was from 4:00 to 6:00. I think that was ample time for a man familiar with books to examine those books to conduct an examination concerning Exhibit No. 6.

Mr. Margolis. In order that the record may be complete, your Honor, I want to state that it was a physical impossibility to complete the examination within that time, and I am going to state now what we were doing. * * *

Your Honor will recall that one of the questions that was asked Mr. Ross on cross-examination was how he explained that there was so small a difference between the amount which he paid for the fish and the gross which he received for the fish. * * *

A quick examination of the books—and I am not prepared to say that we have completed that examination or have arrived at any definite conclusion; we didn't have an opportunity to do that—a quick examination indicated that the price differential between what was paid and what was received ran about 100 per cent, and that a difference of about 40 per cent was simply inconsistent. We were therefore listing buying prices and comparing them with selling prices for the purpose of seeing whether that differential which was shown to exist on there was at all consistent with his comparative buying and selling prices. Now I didn't want——

The Court. What difference does it make what profit he makes?

Mr. Margolis. Because, if your Honor please, if he was selling at a hundred per cent mark-up and the sum total shows only a 40 per cent mark-up, then there is something wrong with the figures. That is quite

obvious. If a man sells his fish, keeps selling an item at a hundred per cent mark-up, then at the end of the year the total sales are only 40 per cent in excess of the total amount paid up, there is an error someplace, either an error or a misrepresentation. * * *

The Court. It seems to me that that is immaterial. The figures are there. What his profit was is immaterial, and this lawsuit, as far as I can see——

Mr. Margolis. Mr. Ross himself told us while we were there that it took his girl three days to prepare the figures and we are given a sum total of, even accepting Mr. Rubin's statement as true, which I don't, two hours. * * *

Mr. Margolis. Just so the record will be clear.

I want to ask leave at this time so that the record will be clear to present evidence in support of our position as to what happened yesterday, the statements of Mr. Ross as to how long it would take to examine those books, precisely what we were doing with respect to those books, so that there will be no question that the representation made——

The Court. No one has challenged your statement.

Mr. Margolis. I beg your pardon?

The Court. No one has challenged the veracity of your statement.

Mr. Margolis. The statement then I assume is accepted as true for the purpose of your Honor's ruling?

The Court. Whatever this is.

Mr. Margolis. Then I ask for a ruling on my request that we be allowed to examine the books without further supervision.

The Court. The request is denied.

* * * * * * *

Mr. Margolis. May I make a request that we be permitted to continue to examine the books for the purpose of further checking the figures first and, second, for the purpose of comparing the purchase price and sales price of the various types of fish as shown by the books of Mr. Ross?

The Court. Your request is denied.

* * * * * * *

Mr. Margolis. I move to strike out Government's Exhibit 6 from the record.

The Court. The motion is denied.

Mr. Margolis. At this time I move to strike all of the testimony of Mr. Ross with respect to Government's Exhibit No. 6.

The Court. The motion is denied." (Tr. pp. 294-309.)

Appendix DD

He was assistant professor of Statistics and Sociology in the graduate faculty of Columbia for a period of eight years. He was chief statistician of the Columbia office of Radio Research, now called the Bureau of Applied Social Reference, for some seven years, in which capacity he supervised all the statistical work of the Office of Radio Research. He dealt mainly in war research of a statistical nature under a contractual arrangement with the Bureau of Census, the Office of War Information and other governmental agencies. One of the many things done by the Office of Radio Research was to prepare tests for foreign language propaganda broadcasts for the foreign division of the OWI, the major problem being to test reactions of individuals for the purpose of redesigning foreign language broadcasts to do a more effective job. For this purpose, it was necessary to design an experiment to carry out the given purpose, to wit: the devising of scales to quantitatively record the reactions of individuals, and devising tests of significance to determine their likelihood of occurring again. In addition, he has acted as consultant on statistical jobs and problems for the Columbia Broadcasting System, the National Broadcasting Company, the Princeton Radio Research Project, the Rockefeller Foundation, the E. I. Dupont de Nemours Company, Time Magazine, Fortune Magazine, more particularly the Fortune Poll, War Production Board, Army Service of Supply, Office of War Information, and the United

States Bureau of Census. Among other things, he worked on a special cross-section sample of the United States for the War Production Board with the objective of determining the needs of consumers during the war. He functioned as consultant to Elmo Roper, the director of the Fortune Poll, for the purpose of working out sampling techniques and mathematical problems. He is under contract to write a book on statistics for Houghton, Mifflin & Company, of which he has written some 900 pages out of a total of 2,500 pages. In addition, he has written a number of articles in the technical field of statistics, most of which are in various governmental agency files. (Tr. pp. 2174-79, 2189-90.)